English version of the judgment of the Quebec Court of Appeal in *Munyaneza v. R*

Munyaneza c. R. **2014 QCCA 906**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-10-004416-093
(500-73-002500-052)

DATE: MAY 7, 2014

CORAM: THE HONOURABLE PIERRE J. DALPHOND, J.A
ALLAN R. HILTON, J.A.
FRANÇOIS DOYON, J.A.

DÉSIRÉ MUNYANEZA
APPELLANT – Accused
v.

HER MAJESTY THE QUEEN
RESPONDENT – Prosecutrix
and

THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE
CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS
INTERVENERS

JUDGMENT

INTRODUCTION

[1] From April to July of 1994, a domestic armed conflict led to the massacre of approximately 800,000 Rwandas (primarily members of the Tutsi ethnic group, as well as so-called moderate Hutus) and to numerous other acts of violence (rape, physical abuse, kidnappings, pillage, and others). The horror of this period has forever scarred those who survived it, the country of Rwanda, and the collective memory of the world.

[2] These tragic events have given rise to numerous prosecutions before the International Criminal Tribunal for Rwanda ("ICTR"), the special tribunal constituted under the authority of the United Nations that is based in Arusha, Tanzania, where several of the leaders have stood trial, as well as before national Rwandan courts. Prosecutions have also been instituted in other countries, including two in Canada, which is a State signatory to the *Rome Statute of the International Criminal Court*, 17 July 1998 (amended 1999 and 2000), A/CONF.183/9 ("*Rome Statute*").

[3] This is appeal is born from a guilty verdict rendered in the first Canadian trial (2009 QCCS 2201), that of Désiré Munyaneza, a resident of this country, who was charged with participating in events that took place on the territory of the prefecture of Butare, one of Rwanda's territorial divisions.[1]

BACKGROUND

[4] When the Rwandan tragedy occurred, the appellant was living in the city of Butare, the country's second-largest city and part of the commune of Ngoma, which was one of the twenty communes making up the prefecture of Butare. He was working at his father's store. In July of 1994, he fled Rwanda, settling in Canada in 1997.

[5] After receiving information connecting him with the genocide, the Royal Canadian Mounted Police began a lengthy investigation. In February and March of 2005, investigators travelled to Rwanda and met with 25 individuals who had been identified as potential witnesses in the Canadian trial. A series of photographs was shown to 20 of these potential witnesses. Fifteen of them identified the appellant as the person to whom they referred in their statements.

[6] On October 19, 2005, he was arrested and charged with the following seven counts under the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24 ("*Act*"):

> [TRANSLATION]
>
> **First count:**
>
> Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, committed the intentional killing of members of an identifiable group of people, to wit: the Tutsi, with intent to destroy the Tutsi, in whole or in part, committing an act of genocide, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of genocide, as provided for in subparagraph 6(1)(*a*) of the said *Act*.

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[1] A second prosecution, which was instituted in Ontario, gave rise to a later judgment: *R. v. Jacques Mungwarere,* 2013 ONCS 4594.

Second count:

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, caused serious bodily or mental harm to members of an identifiable group of people, to wit: the Tutsi, with intent to destroy the Tutsi, in whole or in part, committing an act of genocide, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of genocide, as provided for in subparagraph 6(1)(*a*) of the said *Act*.

Third count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, committed the intentional killing of members of a civilian population or an identifiable group of people, to wit: the Tutsi, knowing that the said intentional killing was part of a widespread or systematic attack on the Tutsi, committing a crime against humanity, as defined in subsections 6(3), 6(4) and 6(5) of the *Crimes Against Humanity and War Crimes Act,* S.C. 2000, c. 24, thereby committing the indictable offence of a crime against humanity, as provided for in subparagraph 6(1)(*b*) of the said *Act*.

Fourth count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, committed the act of sexual violence in regard to members of a civilian population or of an identifiable group of people, to wit: the Tutsi, knowing that the said act of sexual violence was part of a widespread or systematic attack on the Tutsi, committing a crime against humanity, as defined in subsections 6(3), 6(4) and 6(5) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of a crime against humanity, as provided for in subparagraph 6(1)(*b*) of the said *Act*.

Fifth count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, during an armed conflict, to wit: hostilities between the Rwandan Armed Forces (RAF) and the Rwandan Patriotic Front (RPF), committed the intentional killing of people who were not taking a direct part in the said conflict, committing a war crime, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Ac*t, S.C. 2000, c. 24, thereby committing the indictable offence of a war crime, as provided for in subparagraph 6(1)(*c*) of the said *Act*.

Sixth count

Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, during an armed conflict, to wit: hostilities between the Rwandan Armed Forces (RAF) and the Rwandan Patriotic Front (RPF), committed the act of sexual violence against people, committing a war crime, as defined in subsections 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act,* S.C. 2000, c. 24, thereby committing the indictable offence of a war crime, as provided for in subparagraph 6(1)(*c*) of the said *Act*.

Seventh count

> Between April 1, 1994 and July 31, 1994, in the Prefecture of Butare, in Rwanda, during an armed conflict, to wit: hostilities between the Rwandan Armed Forces (RAF) and the Rwandan Patriotic Front (RPF), pillaged, committing a war crime, as defined in subparagraphs 6(3) and 6(4) of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, thereby committing the indictable offence of a war crime, as provided for in subparagraph 6(1)(*c*) of the said *Act*.

[7] In brief, the seven counts refer to distinct offences committed by various means during a single time period (from April 1, 1994, to July 31, 1994) and in a single location (the prefecture of Butare):

- two counts of genocide, one by murder and the other by causing serious bodily or mental harm;
- two counts of crimes against humanity, one by intentional killings and the other by acts of sexual violence;
- three counts of war crimes, the first by murders, the second by acts of sexual violence, and the third by pillage.

[8] The appellant subsequently applied for release pending trial. On April 27, 2006, this application was rejected by Denis, J. of the Superior Court of Quebec (2006 QCCS 8007).

[9] On October 5, 2006, the appellant filed a motion under sections 601 et seq. of the *Criminal Code*, R.S.C. 1985, c. C-46 entitled [TRANSLATION] "Motion to quash counts and, in the alternative, motion relating to the counts" in which he contested the validity of the indictment on the following grounds:

- The indictment fails to comply with section 589 *Cr. C.* (no count that charges an indictable offence other than murder shall be joined in an indictment to a count that charges murder);
- Counts 1 to 6 fail to comply with section 581 *Cr. C.* and in particular counts 1 to 3 (because they do not refer to a single transaction and are not sufficiently detailed);
- Count 7 alleges that the appellant committed an offence that is unknown and non-existent under Canadian law, namely, pillage.

[10] Denis J. dismissed the motion in a judgment rendered on November 20, 2006, holding that the changes were for specific offences under the *Act*, which were based on international law (2006 QCCS 8010).

[11] The trial was preceded by a rogatory commission in Rwanda in January and February of 2007. It was held in Montreal beginning in March of 2007 and included rogatory commissions in 2008 in Paris, Kigali, and Dar es Salaam. In total, 66 witnesses were heard and 200 exhibits were filed over the eight months of trial. It should also be pointed out that the trial took place before Denis J. sitting alone, as the parties agreed

and as permitted by the *Act*, and not before a judge and jury as is usually the case in prosecutions for murder under the *Criminal Code*.

[12] On May 22, 2009, the appellant was convicted on all seven counts. To safeguard the identity of several of the witnesses and thus protect them from any possible reprisals, the judgment of conviction consisted of two documents: one public judgment, which is 2095 paragraphs length, and a confidential schedule of 1728 paragraphs that contains the judge's more detailed review and analysis of the testimony.

[13] On October 29, 2009, the appellant was sentenced to life imprisonment (2009 QCCS 4865).

THE GROUNDS OF APPEAL

[14] The appellant raises several grounds, which can be grouped into five categories, which the Court will address in the following order:

- the acts alleged in counts 5, 6, and 7 do not constitute war crimes according to international law in force in 1994 or, in the alternative, according to Canadian law in 1994;
- the invalidity of the seven counts on grounds of vagueness;
- the commission of irregularities by the judge, rendering the trial unfair;
- the judge's misinterpretation of the constituant elements of the alleged offences; and
- the clear lack of credibility of the Crown's witnesses invalidating the verdict.

THE EXISTENCE IN 1994 OF THE WAR CRIMES ALLEGED AND THE VALIDITY OF PROSECUTION FOR SUCH CRIMES IN CANADA

[15] The appellant maintains that the three war crimes with which he was charged did not exist according to international law because the underlying acts would have been committed during a non-international armed conflict as opposed to an international armed conflict. He argues that such acts only became crimes according to international law in 1998 with the adoption of the *Rome Statute.* Moreover, pillage of a home and of businesses, which are the offences underlying the seventh count, still do not constitute crimes in international law.

[16] In the alternative, if, in 1994, war crimes under international law did include acts committed during a non-international armed conflict, their prosecution could not take place in Canada because subsection 7(3.76) *Cr. C.,* which was in force at the time, defined "war crimes" as acts committed during an international armed conflict. Therefore, unless the *Act* is retroactive in effect, which the appellant argues is

prohibited under paragraph 11(*g*) of the *Canadian Charter of Rights and Freedoms*, he could not be prosecuted in Canada for the war crimes alleged in counts 5, 6, and 7.

[17] Finally, considering that section 11 of the *Act* recognizes the right to raise any defence in existence in Canada in 1994, the appellant argues that he may raise the fact that the alleged acts were not offences in this country at the time because they were committed in the context of a non-international armed conflict.

[18] On these grounds, the appellant asks the count to quash the fifth, sixth and seventh counts and to annul the verdicts arising therefrom.

[19] In the Court's opinion, these arguments have no merit.

(i) Existence of the war crimes alleged according to international law in 1994

[20] Subsection 6(3) of the *Act* defines war crimes as follows:

> "war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
>
> « crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

[21] Because this definition refers to international law, for there to be a crime, [TRANSLATION] "international law must itself define the individual unlawful acts considered to be offences" (Patrick Dallier, Mathias Forteau and Alain Pellet, *Droit international public*, 8th ed. (Paris: LGDJ, 2009) at 780).

[22] It must be noted that there are three sources of international law, which interact with each other:

- conventions, treaties, and other international agreements (conventional international law);
- international custom (customary international law); and
- general principles of law recognized by the community of nations.

[23] The *Act*, however, refers only to two of the three sources of international law: customary and conventional international law. In other words, it excludes the third, the general principles of law recognized by the community of nations.

[24] In the present case, it cannot be determined whether the acts alleged in the fifth, sixth, and seventh counts constituted war crimes in 1994 by referring to the *Rome Statute* because subsection 6(4) of the *Act* states that the *Rome Statute* codifies crimes according to customary international law as of July 17, 1998:

> (4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.
>
> (4) Il est entendu que, pour l'application du présent article, les crimes visés aux articles 6 [crimes de génocide] et 7 [crimes contre l'humanité] et au paragraphe 2 de l'article 8 [crimes de guerre] du Statut de Rome sont, au 17 juillet 1998, des crimes selon le droit international coutumier, et qu'ils peuvent l'être avant cette date, sans que soit limitée ou entravée de quelque manière que ce soit l'application des règles de droit international existantes ou en formation.

[25] With regard to crimes against humanity, however, subsection 6(5) of the *Act* provides that they existed before the coming into force of the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, signed in London in August of 1945 ("*London Agreement*"), and of a proclamation by the Allied Forces in January of 1946, and thus, long before the *Rome Statute* and long before the events in Rwanda in 1994.

[26] As for genocide, this crime has been recognized under customary international law since long before 1994, as attested by the *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, 9 December 1948, coming into force: 12 January 1951, signed by Canada and Rwanda on September 3, 1952, and April 16, 1975, respectively. It has also been recognized in international jurisprudence: *Prosecutor v. Jean-Paul Akayesu* (2 September 1998), Case No. ICTR-96-4-T (ICTR, Trial Chamber) at para. 495, aff'd by the Appeals Chamber (1 June 2001), Case No. ICTR-96-4-A, and in commentary: Guénaël Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford: Oxford UP, 2005) at 199 et seq.

[27] With regard to the underlying acts alleged against the appellant in the fifth, sixth, and seventh counts – murder, sexual violence and pillage during a non-international armed conflict – the *Act* leaves it to the Court to determine whether they constituted war crimes before 1998, and specifically in 1994, according to customary or conventional international law. Indeed, this is the only possible meaning of the words "This does not limit or prejudice in any way the application of existing or developing rules of international law" in subsection 6(4) of the *Act* (Fannie Lafontaine, *Prosecuting Genocide, Crimes against Humanity and War Crimes in Canadian Courts* (Scarborough, Ont.: Carswell, 2012) at 177).

[28] The Crown and the interveners begin by pointing out that the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*1125 U.N.T.S. 609, 8 June 1977, was incorporated into Canadian law through the *Geneva Conventions Act*, R.S.C. 1985, c. G-3, s. 2(2). *Protocol II*, which, as its title indicates, applies to non-international armed conflicts, provides that murder, rape (sexual violence constituting serious outrage to a person's dignity) and pillage are prohibited at all times:

> Article 4 -- Fundamental guarantees
>
> 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
>
> 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
>
> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> (b) collective punishments;
>
> (c) taking of hostages;
>
> (d) acts of terrorism;
>
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
>
> Article 4 -- Garanties fondamentales
>
> 1. Toutes les personnes qui ne participent pas directement ou ne participent plus aux hostilités, qu'elles soient ou non privées de liberté, ont droit au respect de leur personne, de leur honneur, de leurs convictions et de leurs pratiques religieuses. Elles seront en toutes circonstances traitées avec humanité, sans aucune distinction de caractère défavorable. Il est interdit d'ordonner qu'il n'y ait pas de survivants.
>
> 2. Sans préjudice du caractère général des dispositions qui précèdent, sont et demeurent prohibés en tout temps et en tout lieu à l'égard des personnes visées au paragraphe 1 :
>
> a) les atteintes portées à la vie, à la santé et au bien-être physique ou mental des personnes, en particulier le meurtre, de même que les traitements cruels tels que la torture, les mutilations ou toutes formes de peines corporelles;
>
> b) les punitions collectives;
>
> c) la prise d'otages;
>
> d) les actes de terrorisme;
>
> e) les atteintes à la dignité de la

(f) slavery and the slave trade in all their forms;	personne, notamment les traitements humiliants et dégradants, le viol, la contrainte à la prostitution et tout attentat à la pudeur;
(g) pillage;	f) l'esclavage et la traite des esclaves sous toutes leurs formes;
(h) threats to commit any of the foregoing acts.	g) le pillage;
[Emphasis added.]	h) la menace de commettre les actes précités.

[29] The appellant nevertheless responds that there was no clear consensus before 1994 as to whether all of the norms recognized in the Additional Protocols were customary, referring in particular to Robert J. Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law, 2010) at 146.

[30] To decide this issue, the Court may rely on international jurisprudence from the 1990s dealing with the content of customary law in war crimes cases, following the Supreme Court of Canada's suggestion in *Mugusera v. Canada (M.C.I.)*, [2005] 2 S.C.R. 100, 2005 SCC 40, at para. 126.

[31] Accordingly, the judgment in *Prosecutor v. Tadic* (2 October 1995) Case No. IT-94-1 (ICTY, Appeals Chamber) states that *Protocol II* crystallized customary law in 1977:

> 117. Attention must also be drawn to Additional Protocol II to the Geneva Conventions. Many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles. This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (see, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (see, e.g., 43 *Annuaire Suisse de Droit International*, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"(6) (See Informe de la Fuerza Armata de El Salvador sobre el respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson,

speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> [T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) American University Journal of International Law and Policy (1987) 419, at 430-31).

[Emphasis added; formatting and citations omitted.]

[32] In *Akayesu*, *supra*, the Appeals Chamber of the ICTR concluded that *Protocol II* applied to the Rwandan genocide:

> 616. It should be noted, moreover, that Article 4 of the ICTR Statute states that, "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations* of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977" (emphasis added). The Chamber understands the phrase "serious violation" to mean "a breach of a rule protecting important values [which] must involve grave consequences for the victim", in line with the above-mentioned Appeals Chamber Decision in Tadic , paragraph 94. The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 - which contains fundamental prohibitions as a humanitarian minimum of protection for war victims – and Article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in Article 4 of the Statute thus comprises *serious* violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.
>
> 617. The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator. In addition to this argument from custom, there is the fact that the Geneva Conventions of 1949 (and thus Common Article 3) were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, and were therefore in force on the territory of Rwanda at the time of the alleged offences. Moreover, all the offences enumerated under Article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute.
>
> [Emphasis added.]

[33] Therefore, there can be no doubt that, in 1994, war crimes comprised serious acts such as murder and rape, an act of sexual violence constituting serious harm to the integrity and dignity of victims that were committed during a non-international armed conflict in Rwanda.

[34] As for pillage, it has been a crime under customary and conventional law for a very long time. Indeed, pillage and its synonym, plunder, have been recognized in several international instruments and treaties.

[35] For example, Article 6(*b*) of the *Charter of the International Military Tribunal*, which forms part of the London Agreement, 82 U.N.T.S. 285 and which created the Nuremberg Tribunal, includes “plunder of public and private property” in its definition of war crimes.

[36] The *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907, an earlier agreement considered to be part of customary law, prohibits, in Article 28, “the pillage of a town or place, even when taken by assault”.

[37] Similarly, Article 3(*e*) of the *Statute of the International Criminal Tribunal for the former Yugoslavia* (“*ICTY Statute*”, 25 May 1993, U.N. Doc. S/RES/827, implicitly recognizes pillage as a war crime, while Article 4(*f*) of the *Statute of the International Criminal Tribunal for Rwanda (“ICTR Statute”)*, U.N. Doc. S/RES/955, 8 November 1994 does so explicitly. Furthermore, the latter statute criminalizes pillage by recognizing the offences enumerated in the *Geneva Conventions* and *Protocol II.*

[38] It is therefore not surprising that, in *Akayesu*, at para. 609, the Trial Chamber, recognized that the fundamental guarantees in Article 4 of *Protocol II*, including that protecting against pillage, were customary in nature.

[39] Moreover, pillage need not be carried out by an army.

[40] In *Prosecutor v. Delalic*, *Mucic, Delic and Landzo (Celebici Camp)* (16 November 1998) Case No. IT-96-21-T (ICTY, Trial Chamber) at para. 590, the Tribunal recognized that the "prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property".

[41] In *Prosecutor v. Jelisic* (14 December 1999) Case No. IT-95-10-T (ICTY, Trial Chamber) at para. 48, the same Tribunal states that plunder is "the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto" and that "individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrator".

[42] Recent commentary has adopted this position as well (Currie at 135, Mettraux, at 138 et seq.).

[43] In the circumstances, the Court is of the view that, in 1994, pillage was a war crime according to customary international law when committed in the context of a non-international armed conflict.

[44] The appellant also criticizes the parameters of the underlying offence of pillage, which the Court will discuss later on in its analysis of the requisite elements to find that a war crime by pillage has occurred.

[45] For these reasons, the Court finds that, before 1994, the underlying offences alleged in the fifth, sixth and seventh counts committed during a non-international armed conflict were war crimes according to international law.

(ii) *The Act explicitly permits prosecution for these acts in Canada*

[46] Following the recommendations of the Deschênes Commission in its report filed in 1985, Parliament amended the *Criminal Code* to include crimes against humanity and war crimes committed outside Canada in subsections 7(3.71) to 7(3.77) (S.C. 1987, c. 37) (Lafontaine at 15–26). These amendments contemplated only war crimes committed during an international armed conflict.

[47] In 2000, to give full effect to Canada's adherence to the *Rome Statute*, Parliament adopted the *Act*, which criminalizes all acts that, according to international law, constitute genocide, crimes against humanity, or war crimes committed in Canada (section 4) or outside Canada (section 6).

[48] Offences committed outside Canada may be prosecuted in Canada, regardless of when they were committed.

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada	6. (1) Quiconque commet à l'étranger une des infractions ci-après, avant ou après l'entrée en vigueur du présent article, est coupable d'un acte criminel et peut être poursuivi pour cette infraction aux termes de l'article 8 :
(a) genocide,	a) génocide;
(b) a crime against humanity, or	b) crime contre l'humanité;
(c) a war crime,	c) crime de guerre.
is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.	[…]
…	9. (1) Les poursuites à l'égard d'une infraction visée par la présente loi qui aurait été commise à l'étranger peuvent être engagées dans toute circonscription territoriale au Canada, que l'accusé se trouve ou non au Canada, et celui-ci peut subir son procès et être uni, à l'égard de cette infraction, comme si elle avait été commise dans cette
9. (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that	

> offence in the same manner as if the offence had been committed in that territorial division.
>
> …
>
> [Emphasis added.]

> circonscription territoriale.
>
> […]

[49] Thus, the *Act* criminalizes in Canadian law all acts constituting crimes within the meaning of international law at the time they were committed. As noted previously, these crimes include genocide, war crimes, and crimes against humanity during a non-international armed conflict.

[50] It is true that the crimes alleged against the appellant were committed in 1994, whereas the *Act* was not enacted until 2000. This does not, however, result in the retroactive creation of an offence.

[51] The *Act* does not attempt to create an offence *ex post facto*. Rather, it seeks merely to allow the prosecution in Canada of persons who, before the *Act* entered into force, committed acts that, at the time of their commission, constituted genocide, crimes against humanity, or war crimes, according to the definitions of those crimes under international law, as illustrated by subection 6(3) of the *Act*:

> "crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
>
> "war crime" means an act or omission committed during an armed conflict that, at the time

> « crime contre l'humanité » Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
>
> « crime de guerre » Fait — acte ou omission — commis au

and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	« génocide » Fait — acte ou omission — commis dans l'intention de détruire, en tout ou en partie, un groupe identifiable de personnes et constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
[Emphasis added.]	

[52] The *Act* is thus consistent with paragraph 11(*g*) of the *Charter*, which recognizes that the criminal nature of an act at the moment it is committed may be assessed under either domestic or international law:

11. Any person charged with an offence has the right	11. Tout inculpé a le droit :
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;	g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;
[Emphasis added.]	

[53] Moreover, the law of this country does not prohibit an amendment to the rules governing the jurisdiction of courts to allow for prosecutions in Canada for acts that, at the time they were committed, were offences under Canadian or international law (*R. v. Finta*, [1994] 1 S.C.R. 701). And in fact, that is what the *Act* did.[2]

[54] In summary, through the *Act* and the repeal of the 1987 amendments to the *Criminal Code*, Parliament did not create new legal consequences for the past but only for the future. At most, the *Act* is retrospective in effect but not retroactive, as defined in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 at 381.[3]

[55] Consequently, the *Act* validly permits the prosecution of an individual in Canada for a war crime committed before 2000.

(iii) The end of impunity: a valid effect of the Act

[56] Upon the enactment of the *Act*, the perpetrators of war crimes, crimes against humanity, and genocide could no longer come to Canada seeking immunity from prosecution. During one of the Parliamentary debates, MP Raymond Chan made a statement on behalf of the Minister of Foreign Affairs, confirming this objective:

> The crimes against humanity and war crimes act has been amended to ensure that Canada will be able to fully prosecute individuals who commit mass murder, rape, torture or any other similar heinous crimes against humanity. The customary international law definitions of genocide, crimes against humanity and war crimes will now be recognized inside Canada.
>
> Canada's ability to assert universal jurisdiction for these crimes has also been streamlined and simplified. Now, as long as the person accused of the crime is found in Canada, they will fall under our jurisdiction, regardless of when or where the crime took place. This change ensures that those who have committed or who commit in the future the most egregious crimes will not find a safe haven in Canada.[4]
>
> [Emphasis added.]

[57] Consequently, the appellant may be prosecuted in Canada for acts committed in 1994 in Rwanda if these acts constituted crimes according to international law at the time.

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2 David Goetz, *Bill C-19: Crimes Against Humanity and War Crimes Act* (LS-360E) (Ottawa: Library of Parliament, Research department, Law and Government Division, 5 April 2000, rev. 15 June 2000), online: http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?lang=F&ls=C19&Parl=36&Ses=2&source=Bills_House_Government

3 See also Pierre-André Côté in collaboration with Stéphane Beaulac & Mathieu Devinat, *Interprétation des lois*, 4th ed. (Montreal: Thémis, 2009) at para. 509; Hubert Reid, *Dictionnaire de droit québécois et canadien*, 4th ed. (Montreal: Wilson & Lafleur, 2010) at 539; Daphne A. Dukelow, *The Canadian Dictionary of Law*, 4th ed. (Scarborough, Ont.: Carswell, 2011) at 1131.

4 House of Commons Debates, 36th legislature, 2nd session, No. 113 (13 June 2000) at 1110.

[58] Although the appellant does not directly deny this principle, he submits that he is entitled to raise any defence that existed in 1994, including the fact that an offence committed during a non-international armed conflict was not an offence under Canadian criminal law at the time. He invokes section 11 of the *Act*:

11. In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the Criminal Code, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings.	11. Sous réserve du paragraphe 607(6) du *Code criminel* et des articles 12 à 14, l'accusé peut se prévaloir des justifications, excuses et moyens de défense reconnus, au moment de la prétendue perpétration ou au moment du procès, par le droit canadien ou le doit international.

[Emphasis added.]

[59] In the Court's view, the fact that he knew that he could take refuge in a country where no prosecution was possible for an international crime cannot be raised as a justification, excuse, or defence available at the time of the offence.

[60] In other words, the loss of immunity from prosecution for an international crime by a perpetrator who now resides in Canada is not a defence and cannot be raised under section 11 of the *Act.*

THE VALIDITY OF THE DRAFTING OF THE INDICTMENT

[61] The appellant argues that the counts do not meet the degree of precision required by the international criminal tribunals, thus rendering his trial unfair. In his view, the location of the alleged offences, the identity of the victims, and the nature of the incidents at issue should have been precisely identified in each of the counts. In support of his position, he invokes judgments of the international criminal tribunals, including that of the Trial Chamber in *Prosecutor v. Milosevic* (13 December 2001) Cases No. IT-99-37-AR73 and IT-01-50-AR73 (ICTY, Trial Chamber) and that of the Appeals Chamber, (18 April 2002) No. IT-01-51-AR73, in which the indictment was over 65 pages long, including schedules listing the victims of each offence.

[62] He also refers to the procedure of the ICTR, which involves a two-part indictment, with the first setting out the offence alleged by the prosecution and the second containing a detailed summary of the facts surrounding the commission of the offence. He concludes that, contrary to what the trial judge wrote, the Crown can be required to describe the offences in more detail without depriving the *Act* of its effects.

[63] He also argues that this degree of detail is also required under the *Charter*, particularly paragraph 11(*a*) (the right to be informed without unreasonable delay of the specific offence), paragraph 11(*h*) (the right not to be tried again for the same offence), and section 7 (the right to a fair trial and to make full answer and defence), especially

since the charges are complex, involve several events, and contemplate very harsh sentences.

[64] In his opinion, the counts as drafted were too vague and thus prevented him from adequately preparing his defence, as he was kept in the dark about the Crown's theory until a document summarizing the facts giving rise to the alleged offences was filed after the Crown had closed its case. He also faults the Crown for waiting too long to provide him with the document, without which he was unable to object to the filing of certain pieces of evidence that later turned out to be irrelevant.

[65] The appellant also argues that the judge erred in law by taking into account the disclosure of the evidence in his determination of whether the drafting of the counts was sufficiently precise. An accused should not be required to analyze the content of the evidence disclosed to know precisely with what he is accused. Rather, this information should be included in the indictment. This principle has been recognized by both Canadian courts and international tribunals, pertaining as it does to the right of all accused to a fair trial.

[66] Citing subsection 581(1) *Cr. C.*, which provides that each count in an indictment shall in general apply to a single transaction, the appellant argues that the Crown unduly benefited from the indictment as drafted because all it had to prove was his participation in a single underlying act to obtain a conviction, while the appellant, to be acquitted, had to raise a reasonable doubt as to his participation in all of the underlying acts the Crown alleged. This imbalance, he claims, rebuts the argument of the "single criminal transaction" accepted by the judge. In this case, each count contains multiple transactions (or in French, "*affaires*"), which should be alleged in an equal number of separate counts.

[67] These arguments cannot succeed.

[68] While indictments filed before the international criminal tribunals are admittedly highly detailed, this is because the procedural rules are different. In this case, however, the Canadian rules in sections 581 to 601 *Cr. C*. apply, and they are a complete codification of the procedure for indictments.

[69] Sections 9 and 10 of the *Act* specify that the trial is held in accordance with Canadian procedure:

9. (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that	9. (1) Les poursuites à l'égard d'une infraction visée par la présente loi qui aurait été commise à l'étranger peuvent être engagées dans toute circonscription territoriale au Canada, que l'accusé se trouve ou non au Canada, et celui-ci peut subir son procès et être puni, à l'égard de cette infraction, comme si elle avait

offence in the same manner as if the offence had been committed in that territorial division.	été commise dans cette circonscription territoriale.
(2) For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply.	(2) Il est entendu que la procédure visée au paragraphe (1) est assujettie aux dispositions du code criminel concernant l'obligation pour un accusé d'être présent et de demeurer présent pour la durée de la procédure et les exceptions à cette obligation.
…	[…]
10. Proceedings for an offence alleged to have been committed before the coming into force of this section shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.	10. Les poursuites engagées à l'égard d'une infraction qui aurait été commise avant l'entrée en vigueur du présent article [Note : 23 octobre 2000] sont menées conformément aux règles de preuve et de procédure en vigueur au moment du procès.

[70] Thus, the trial must be conducted as though the offence was committed in Canada. Moreover, when Parliament chooses to introduce principles or rules drawn from international law, it states so explicitly. This is the case, for example, in the definition of genocide, war crimes, and crimes against humanity in subsection 6(3) of the *Act* and section 11 dealing with defences.

[71] There is nothing, however, to indicate that Parliament wished to incorporate the special rules adopted by the international criminal tribunals into the *Act* or to create a hybrid system of Canadian and international rules.

[72] The validity of the indictment and its impact on the fairness of the trial must be analyzed under Canadian rules. Accordingly, it is sufficient for an indictment to comply with the requirements in section 581 *Cr. C.*:

581. (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.	581. (1) Chaque chef dans un acte d'accusation s'applique, en général, à une seule affaire; il doit contenir en substance une déclaration portant que l'accusé ou le défendeur a commis l'infraction qui y est mentionnée.

(2) The statement referred to in subsection (1) may be

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;

(b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or

(c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

(4) Where an accused is charged with an offence under section 47 or sections 49 to 53, every overt act that is to be relied on shall be stated in the indictment.

(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

(2) La déclaration mentionnée au paragraphe (1) peut être faite :

a) en langage populaire sans expressions techniques ni allégations de choses dont la preuve n'est pas essentielle;

b) dans les termes mêmes de la disposition qui décrit l'infraction ou déclare que le fait imputé est un acte criminel;

c) en des termes suffisants pour notifier au prévenu l'infraction dont il est inculpé.

(3) Un chef d'accusation doit contenir, à l'égard des circonstances de l'infraction présumée, des détails suffisants pour renseigner raisonnablement le prévenu sur l'acte ou omission à prouver contre lui, et pour identifier l'affaire mentionnée, mais autrement l'absence ou insuffisance de détails ne vicie pas le chef d'accusation.

(4) Lorsqu'un prévenu est accusé d'une infraction visée à l'article 47 ou à l'un des articles 49 à 53, tout acte manifeste devant être invoqué doit être indiqué dans l'acte d'accusation.

(5) Un chef d'accusation peut se référer à tout article, paragraphe, alinéa ou sous-alinéa de la disposition qui crée l'infraction imputée et, pour déterminer si un chef d'accusation est suffisant, il est tenu compte d'un tel renvoi.

(6) Nothing in this Part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of this section.	(6) Les dispositions de la présente partie concernant des matières qui ne rendent pas un chef d'accusation insuffisant n'ont pas pour effet de restreindre ou limiter l'application du présent article.

[73] Subsection 1 sets out the "single transaction" rule (in French: "*une seule affaire*"). As the trial judge pointed out, it has long been established that this rule does not prohibit grouping together a series of incidents that relate to a similar activity or a similar course of conduct, if they are part of a single operation (*R. v. G.L.M.*, [1999] B.C.J. No. 1838 (QL) (B.C.C.A.); *R. v. Pomerleau*, [1999] J.Q. No. 5210 (QL) (C.Q.); *R. v. Selles*, [1997] O.J. No. 2502 (QL) (ON C.A.); *R. v. Adams and Waltz* (1989) 49 C.C.C. (3d) 100 (ON C.A.); *R. v. German* (1989) 51 C.C.C. (3d) 175 (SK C.A.); *Piquette v. R.*, [1976] C.A. 667 at 668).

[74] In *Philippe v. R.*, J.E. 2004-398, this Court noted that the formalism once required is no longer mandatory, although it urged prudence when the trial is before a jury:

> [TRANSLATION]
>
> [28] Subsection 581(1) *Cr. C.* requires that the count apply to a "single transaction" only. It has long been established that the terms "a single transaction" or "*une seule affaire*" do not preclude referring to several incidents in one count. Although the rules governing the drafting of indictments were long formal and strict, there are nevertheless cases from rather far back in judicial history involving indictments that group together several similar incidents. …
>
> [29] The statement in a count encompassing several events must receive particular attention in a trial before judge and jury, where the rule of unanimity prevails. For example, where two distinct transactions are contemplated in one count, care must be taken to prevent a jury from arriving at a unanimous verdict of guilt for an alleged offence if six of the jurors are convinced beyond any reasonable doubt of the accused's guilt with respect to the first transaction and the other six are equally persuaded although with respect to the second transaction. Where the transactions contemplated in the counts are not part of an ongoing series of events and are distinct as to the manner in which they were perpetrated and the defences raised against them, the judge would be wise to order that the count be divided (subsection 590(3) *Cr. C.*).

[75] Certainly, the latter concern is justified. For example, can a jury, unanimous as to the commission of genocide, convict an appellant on the first count, if six of the jurors based their finding of guilt on the murders committed near the Ngoma church and the other six based it on the murders committed after the kidnappings at the roadblocks? However interesting this question may be, the Court need not decide it, since this trial took place before a judge alone.

[76] In this case, the issue must instead be analyzed in light of the acts that are the subjects of each of the counts.

[77] The appellant is not charged with murder, sexual violence, or pillage. He is charged with genocide, crimes against humanity, and war crimes, offences that were allegedly committed through murder, sexual violence, and pillage. The distinction is important.

[78] Crimes against humanity, genocide, and war crimes are offences that can be described as "contextual". In crimes against humanity, the underlying offence must be committed during a widespread or systematic attack directed against an identifiable group of persons (*Mugesera* at para. 151), which distinguishes a crime against humanity from an ordinary offence. The same is true with respect to genocide, in which the underlying act must be committed with intent to destroy, in whole or in part, an identifiable group of persons. And with respect to war crimes, as the name indicates, they must be committed during an armed conflict, either domestic or international.

[79] Given the applicable rules, which are outlined above, it is entirely possible for this type of count to encompass a series of similar acts committed during a widespread or systematic attack directed against a civilian population, either in the context of the destruction of an identifiable group of persons or during an armed conflict, and still not violate the single transaction rule. The context reveals a course of conduct that includes the commission of underlying acts, which may then be grouped together, according to their nature, in a single count and constitute a single transaction.

[80] Although the Crown could have drafted one count for every incident, it cannot be criticized for having grouped similar underlying offences referring to the same course of conduct together in a single count. This manner of proceeding is not contrary to the requirements of subsection 581(1) *Cr. C.*

[81] The contextual nature of the offences is also important when the sufficiency of the counts under subsection 581(3) *Cr. C.* is at issue.

[82] The sufficiency requirement has been analyzed on numerous occasions by the Supreme Court of Canada. The golden rule as set out in *R. v. Côté*, [1978] 1 S.C.R. 8 at 13, is for "the accused to be reasonably informed of the transaction alleged against him, thus giving the possibility of a full defence and a fair trial".

[83] The Supreme Court has held that sufficiency is assessed on the basis of the facts of the case and the nature of the charge (*R. v. B.(G.)*, [1990] 2 S.C.R. 30 at 44–45; *R. v. Douglas*, [1991] 1 S.C.R. 301 at 314).

[84] In this case, the appellant was aware of the context of the charges since he admitted that, on the dates specified in the indictment, Rwanda, including the prefecture of Butare, was in the grips of genocide and armed conflict and that the civilian Tutsi population was the target of a widespread or systematic attack. He also knew what underlying acts he was alleged to have committed: murder, sexual violence, pillage. In short, he knew that he was being accused of committing murder, sexual violence and pillage in the context of the systematic or widespread attack against the Tutsi population

and the armed conflict that was ravaging Rwanda, and more precisely in the prefecture of Butare, during a specific period of time, and for having thus committed genocide, a crime against humanity, and a war crime.

[85] Moreover, before the trial, the Crown had disclosed to the appellant all of the evidence in its possession, including a 37-page table of contents, as well as, when his application for release was heard, a summary of the evidence that it intended to adduce at trial, which was no less than 28 pages long.

[86] These are all elements to be considered when determining whether the appellant had sufficient knowledge of the theory the Crown intended to present to be able to prepare an adequate defence against the charges, in accordance with the requirements noted by the Court of Appeal for Ontario in *R. v. Robinson*, [2001] O.J. No. 1072 (QL):

> 23 Whether an indictment or a count in an indictment meets the sufficiency requirement in this subsection depends upon the facts and circumstances of each case. In determining whether the transaction has been sufficiently identified the court will look not just at the wording of the indictment but also at the other material in the possession of the accused such as Crown disclosure and the evidence called at the preliminary inquiry, if there was one: *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399 (Ont. C.A.); *R. v. Ryan* (1985), 23 C.C.C. (3d) 1 (Ont. C.A.). …
>
> [Emphasis added.]

[87] In the other case brought under the *Act*, *R. v. Mungwarere*, *supra*, the trial judge opined that disclosure of evidence is similar to the description of facts required by the international criminal tribunals and allows the accused to become familiar with the evidence for the purpose of preparing the defence:

> [TRANSLATION]
>
> [13] It is true that, at the ICTR, the facts are incorporated into the indictment itself. It is also true that the Court may draw inspiration from the procedure at the ICTR, given that tribunal's experience in such matters. Fundamentally, in this case, there is no real difference between the two ways of proceeding. The statement of fact used by the ICTR and the obligation to disclose incumbent on the Crown in Canada serve the same purpose: to inform the accused. Our procedure has evolved significantly over the last three decades. There was a time where the Crown needed only to submit an indictment listing the essential elements of the offence and nothing more. Now, the golden rule is to ensure that the accused has in hand all of the information that the Crown has in its possession and under its control. Consequently, the accused has detailed knowledge of all of the facts surrounding the allegation against him, including all of the evidence at the Crown's disposal, be it inculpatory or exculpatory.

[88] In this case, the Court finds that the appellant was fully able to prepare his defence and concludes that the counts were sufficient within the meaning of subsection 581(3) *Cr. C.*

[89] As for paragraph 11(*h*) of the *Charter*, the appellant's argument is not convincing. Since an accused has the right not to be tried again for an offence of which he has been acquitted or convicted, the broader the drafting of the offence, the more paragraph 11(*h*) will work in favour of the accused later on by prohibiting new prosecutions concerning any of the events contemplated in the count. In other words, if the count is broadly worded, paragraph 11(*h*) cannot be used to counter it.

[90] Before concluding this section, it should be pointed out that initially, the appellant argued that the first, third, and fifth counts, which allege murder, and the second, fourth, sixth, and seventh counts could not be joined in the same indictment in light of section 589 *Cr. C.,* which prohibits the inclusion of counts charging indictable offences other than murder when such a charge is brought, unless the other counts arise out of "the same transaction". The Court is of the view that he was right to abandon this ground at the hearing. The appellant is not charged with murder but with genocide, crimes against humanity, and war crimes. The murders are simply details included in the count to characterize the charge. This rules out the application of section 589 *Cr. C.* In addition, given the context in which the acts underlying these offences were committed, it would be inappropriate to require that there be as many counts as there are murder allegations, when they all arise out of "the same transaction".

THE ALLEGED IRREGULARITIES

[91] The appellant criticizes the trial judge for visiting the city of Butare without the parties, for using sources not adduced into evidence, including a book written by one of the expert witnesses, Alison Des Forges, entitled *Leave None to Tell the Story*, the website of the International Committee of the Red Cross, and an exhibit, reproduced in a schedule to his judgment, that was different from the one adduced. He submits that the unlawful consideration of this evidence by the judge irremediably compromised the fairness of the trial.

(i) The visit to Butare

[92] During the portion of the trial held in Rwanda, the judge spent a weekend in and around the city of Butare. Afterwards, the following discussion between the judge and counsel took place:

> MR. PERRAS: I will be short.
>
> We did hear, naturally; it was not a hidden venture to go to Butare. But, as far as the Defence is concerned, we are preoccupied, let's say, that the Judge went to what is, practically speaking, a crime scene in this case, because eventually we will be hearing evidence of the topography of the place. Butare and its physical appearance is a factual issue in this case.
>
> THE COURT: I understand your preoccupation, but we were not at the crime scene.
>
> I want it to be very clear. There are two major cities in Rwanda, Kigali and Butare. We work very hard during the week, and we went to, first of all, King's House, which is away from the City of Butare. It is half an hour.
>
> I will tell you exactly what we did.

> After that, we went to the museum, which is also outside Butare, we had lunch at the Ibis Hotel, and then we came back.
>
> That is what we did, exactly, and it was very clear for me, as the leader of our group, that there was no intention to go on First, Second or –
>
> We didn't see anything in Butare, except for King's House, the museum, and the Ibis Hotel. And I think we saw the university. That's it, and it was very clear that I didn't want to see anything concerning the facts that have been put or will be put in front of this Court.
>
> MR. PERRAS: Thank you.
>
> MS LEDOUX: If I may add for Mr. Perras, the King's House, I believe, is in Nyanza.
>
> THE COURT: It is half an hour away.
>
> MS LEDOUX: Yes. I believe it is in Nyanza, not even in Butare.
>
> THE COURT: The museum, I think, is about five minutes out of the city, but it's not in the city.
>
> MR. COHEN: It may be, Your Honour, that we might seek to visit that site as a group, given that you have seen some but not all of the site.
>
> That may be the way to rectify the situation.
>
> MS LEDOUX: Just for the record, the Crown doesn't share the preoccupation of the Defense on that point.
>
> THE COURT: I understand, and I wanted to tell you that we were there.
>
> If we go somewhere else, we will also tell you.
>
> We want to see wild animals, and we will go there one of these days, if we can do that. I'm not sure. I still work during the weekends.
>
> But we were in Butare.
>
> MR. PERRAS: I won't be asking if the Ibis had a five star restaurant.
>
> --- Laughter

[93] The discussion of the incident concluded on this humorous note, and did not result in any motion being filed by the appellant.

[94] Nevertheless, now, in appeal, he believes that the judge could not, on his own initiative and away from the appellant and from counsel, visit the city of Butare, the location where many of the incidents alleged against him took place. According to him, section 650 *Cr. C.* was not respected and the appearance of justice has not been preserved, since it is impossible for the defence to know whether the judge's observations there might have influenced his conclusions and consequently to contest them.

[95] Section 650 *Cr. C.* enshrines the principle whereby the accused must be present in court during the whole of the trial. This principle is reiterated in subsection 9(2) of the *Act.* Section 652 *Cr. C*. prescribes the procedure applicable during a "view" and enshrines the right of the accused to be present during such a visit.

652. (1) The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn and before it gives its verdict, direct the jury to have a view of any place, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury, and may for that purpose adjourn the trial.	652. (1) Lorsque la chose paraît être dans l'intérêt de la justice, le juge peut, à tout moment après que le jury a été assermenté et avant qu'il rende son verdict, ordonner que le jury visite tout lieu, toute chose ou personne, et il donne des instructions sur la manière dont ce lieu, cette chose ou cette personne doivent être montrés, et par qui ils doivent l'être, et il peut à cette fin ajourner le procès.
(2) Where a view is ordered under subsection (1), the judge shall give any directions that he considers necessary for the purpose of preventing undue communication by any person with members of the jury, but failure to comply with any directions given under this subsection does not affect the validity of the proceedings.	(2) Lorsqu'une visite des lieux est ordonnée en vertu du paragraphe (1), le juge donne les instructions qu'il estime nécessaires pour empêcher toute communication indue par quelque personne avec les membres du jury; le défaut de se conformer aux instructions données sous le régime du présent paragraphe n'atteint pas la validité des procédures.
(3) Where a view is ordered under subsection (1), the accused and the judge shall attend.	(3) Lorsqu'une visite des lieux est ordonnée en vertu du paragraphe (1), l'accusé et le juge doivent être présents.

[96] In *Tanguay v. R.*, [1971] J.Q. No. 61 (QL) at para. 24, this Court held that this provision applies to a trial before a judge sitting alone. In addition, in *R. v. Boxembaum*, [1980] J.Q. No. 22 (QL) at para. 19, this Court found that the attendance of the accused was mandatory. Indeed, appellate courts generally consider the failure to follow the foregoing procedure to be a jurisdictional error vitiating the entire process, which cannot be saved by the curative proviso (*R. v. Boucher*, [1987] R.J.Q. 1990 (QC C.A.); *R. v. Predac*, [1983] O.J. No. 149 (QL) (ON. C.A.); *R. v. Gavin*, [1983] B.C.J. No. 2454 (QL) at para. 3 (B.C.C.A.)).

[97] A "view" in the absence of the accused, however, does not always constitute such an error. For the view to fall under sections 650 and 652 *Cr. C.*, it must take place with the objective of moving the trial forward, as this Court pointed out in *Meunier v. R.*, [1965] J.Q. No. 26 (QL) at para. 8, confirmed by the Supreme Court of Canada ([1966] S.C.R. 399). This principle was been endorsed by the British Columbia Court of Appeal in *Gavin* at para. 3 and the Court of Appeal for Ontario in *R. v. Sternig*, [1975] O.J. No. 1442 (QL) at paras. 61–63. See also *Fontaine v. R.*, 2014 QCCA 405 at para. 46.

[98] In short, it is the fact that observations made in the absence of the accused are used for the purpose of adjudication that can be problematic.

[99] Let us now consider the situation here. Did the judge's trip to Butare have the objective of moving the trial forward or, if not, did it have that consequence?

[100] Of course, it would undoubtedly have been preferable if the judge had refrained from visiting this city without speaking to counsel about it beforehand. Nevertheless, the record shows that the judge was there purely as a tourist and that his visit did not have the objective of moving the trial forward within the meaning of the judgments cited above. In fact, nowhere in his judgment or in the schedule to it did the judge refer to his observations during this visit. He never assessed the credibility of any of the witnesses on the basis of these observations. Moreover, the judge did not see the locations where the appellant allegedly committed the crimes, namely, the Ngoma church, the prefectural office, or the roadblocks, for example.

[101] In conclusion, the record shows that the judge's visit was essentially for the purposes of tourism and recreation, as counsel for the appellant understood at the time, and who did not see fit to file any kind of motion in this regard. There is therefore no issue of jurisdictional error.

(ii) The use of sources not adduced in evidence

[102] First, the appellant faults the judge for relying on the book by Alison Des Forges, which had not been adduced into evidence. His counsel objects to such use because it contains four chapters on the events in Butare and mentions certain witnesses who were heard at trial.

[103] It is true that, in paragraphs 155 et seq. of the judgment, the judge states that the portion concerning the history of Rwanda was inspired by Des Forges' work. This limited use had been announced during the trial, however:

> [TRANSLATION]
>
> ... Now, the overall content, Des Forges talks about it, that's what I want... what I want to hear you testify about.
>
> Obviously, Mr. Guyishawa [another author] connects the accused to some very specific facts. I don't believe that we can go that far, and the evidence that I hear is evidence that will be given specifically by the witnesses against Mr. Munyaneza and what he does is evidence that tends to exculpate him and where the line should lead everyone to the constituant elements of the offences, but if

> there is a reasonable doubt, he will be acquitted, that's clear, and if there is not, he will be convicted.
>
> Anywhere Mr. Munyaneza is mentioned in Mr. Guyishawa's treatise, I think we set that aside.
>
> Now, there are plenty of other elements in this history, and Ms. Des Forges, I know, who is a historian, who sketches an outline of the situation as a whole. Even what happened in Kigali, which does not concern us, but which can have... which can give the judge a historical perspective.
>
> So, this is what I want to talk to you about, and I don't know if we have dozens of documents, I am not going to go through everything about the history. …

[104] The appellant does not contest this point. Nevertheless, he argues that the judgment reveals that the use of this book was not limited to the history of the genocide. In support of this claim, he refers to passages from the judgment concerning the speech made by Léon Mugesera in 1992, to the role of propagandist played by *Radio-Télévision libre des mille collines*, and to the judge's conclusion that he committed offences in the city of Butare and [TRANSLATION] "the neighbouring communes", while the evidence concerned solely the offences committed in the commune of Ngoma, in which the city of Butare is located. The appellant adds that if his counsel had known that the judge intended to make such extensive use of Des Forges' book, they would have cross-examined her differently.

[105] As the respondent points out, the appellant is unable to refer to a conclusion of fact concerning him in the judgment that could have been drawn from Des Forges' book. The examples of the borrowings he provides – namely, Mugesera's speech and the propagandist role played by certain media outlets – are part of the history of the genocide and have no connection with the appellant. Furthermore, the speech is reproduced in a schedule to the judgment in *Mugesera*, which was argued before Denis J.

[106] As for the conclusion that the appellant [TRANSLATION] "killed ten or so people in Butare and the surrounding communes", this sentence should not be taken in isolation from the rest of the judgment, much less provide a basis for inferring that the judge relied on external evidence in coming to this conclusion. In reality, throughout his very detailed judgment, the judge found that the appellant had participated in various acts committed in specific locations only in the commune of Ngoma. Perhaps, for the sake of clarity, it might have been preferable if he had written that the appellant had committed murders [TRANSLATION] "in the city of Butare and in the neighbouring areas in the commune of Ngoma", as the Crown suggests, but this in no way proves that he made inappropriate use of the book by Des Forges.

[107] In addition, the judge's comments reproduced above confirm that he was perfectly aware of the limited use he could make of Des Forges' book. It must therefore be assumed that he acted accordingly, as must be done with regard to any evidence that is declared inadmissible. (*R. v. Vidal,* [1997] J.Q. No. 2725 (QL) at para. 47 (QC C.A.).

[108] The appellant also faults the judge for basing his finding that Rwanda was a signatory to the Genocide Convention on his consultation of the Red Cross website.

[109] In this respect, it is the Court's view that the judge did not err by taking cognizance of the list of State parties to an international treaty to which Canada is also a party. Contrary to the appellant's argument, the Supreme Court did not decide in *Finta*, at 867–868, that a State's signing of a convention has to be established through expert evidence. Rather, that judgment refers solely to the fact that expert evidence and commentary are often necessary in the interpretation of international law, many principles of which remain uncodified.

[110] Certainly, it would have been better for the judge to consult the official source, i.e., the *United Nations Treaty Collection*,[5] instead of the Red Cross site. Nevertheless, what the judge did was inconsequential.

(iii) Schedule to the judgment

[111] Finally, the appellant attaches a great deal of importance to the fact that the exhibit in schedule 3(E) to the judgment differs from that adduced at trial, which is exhibit D-74. This exhibit concerns the possible perjury of Crown witness C-15, which will be discussed later on. The appellant uses this as a springboard to question the judge's entire approach and its impact on his right to a fair trial.

[112] No one is able to say exactly how the judge found himself in possession of the incorrect version of exhibit D-74 and why he used this version instead of the one filed at trial. The most plausible explanation was provided by the respondent, who believes that Mtre Dimitri, counsel for the appellant, might have accidentally submitted an earlier version of the document from her computer during the trial.

[113] Did this gaffe necessarily vitiate the process to such a degree that the trial was rendered unfair? The Court does not believe so.

[114] Before the judge, witness C-15 stated that she knew a certain Rose Burizihiza. In cross-examination, the witness was confronted with her testimony before the ICTR in which she had stated that she did not know this woman. She justified this contradiction by explaining that she had denied knowing Rose Burizihiza at the request of counsel for the prosecution at the ICTR. This was the context in which exhibit D-74 was filed. This exhibit consists in an admission by the parties that this attorney, while preparing the testimony of C-15, never suggested that the witness deny knowing this woman. From this, the appellant finds that C-15 perjured herself before the judge, in addition to having lied before the ICTR.

[115] As the respondent rightly points out, exhibit D-74 concerns a strictly collateral fact. It was filed solely to contradict C-15's statement that the ICTR attorney allegedly asked her to lie to the tribunal.

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[5] To consult the list of State signatories to the *Geneva Convention*, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en&clang=_en

[116] In *Manual of Criminal Evidence* (Toronto: Carswell, 2010) at 281–282, Justice David Watt writes about the rule applicable to collateral facts:

> The collateral facts or collateral issues rule prohibits the introduction of evidence for the *sole* purpose of *contradicting* a witness' testimony concerning a collateral fact. … In general, matters that relate wholly and *exclusively* to the credibility of a non-accused witness are collateral, hence beyond the reach of contradictory evidence.
>
> A *collateral* fact is one that is not connected with the *issue* in the case. It is one that the party would not be entitled to prove as part of its case, because it lacks relevance or connection to it. A collateral fact, in other words, is one that is neither
>
> i *material*; nor
>
> ii. *relevant* to a material fact
>
> If the answer of a witness that a party seeks to contradict, is a matter that the opponent could prove in evidence as part of its case, *independent* the contradiction, the matter is *not* collateral. Contradictory evidence may be elicited.
>
> If the answer of a witness that a party seeks to contradict, is a matter that the opponent would *not* be entitled to prove in evidence, *independent* the contradiction, the matter is collateral. Contradictory proof is *not* permitted.
>
> The several exceptions to collateral facts rule include and permit:
>
> i. proof of bias, interest or corruption denied by the witness;
>
> ii. proof of prior inconsistent statement *not* admitted by the witness;
>
> iii. proof of prior conviction *not* admitted by the witness;
>
> iv. disproof of a denial of a reputation for lying or untruthfulness; and
>
> v. disproof of a denial of a physical or mental defect relating to the capacity of likelihood of the witness telling the truth.

[117] In this case, we may describe this evidence as relating to a collateral fact, in that it concerns the credibility of witness C-15 regarding her explanation of a contradiction with a prior statement before a different court.

[118] C-15's credibility was thus undermined, and the reason for her lie was of little importance. All things considered, exhibit D-74 might not have been adduced (as a matter of fact, it should not have been) and nothing would have changed with regard to the issues to be decided by the judge. In the circumstances, the judge's inclusion of the wrong version of exhibit D-74 in the schedule to his judgment caused no prejudice to the appellant, who successfully undermined the credibility of witness C-15 during her cross-examination.

[119] For these reasons, the Court is of the view that all of the grounds alleging irregularities raised by the appellant should be rejected.

CONSTITUANT ELEMENTS OF THE OFFENCES

[120] The appellant argues that the judge convicted him on the seventh count, war crimes by pillage, without considering the requirements of this offence, namely, pillaging "a town or a place". In his view, whatever may have been the elements of a war crime by pillage in 1994, pillage could be punished after July of 1998 only according to the rules of international law as they existed at the time the indictment was filed, namely, those of the *Rome Statute*, which defines a war crime in the context of a non-international armed conflict as a specific list of acts, including "[p]illaging a town or place, even when taken by assault". In this case, no evidence was tendered of pillage of a town or place, but only of a few businesses and a home, and the judge therefore convicted him of an offence that does not exist.

[121] Moreover, during the hearing, in a manner that was at times rather vague, counsel for the appellants faulted the trial judge for his outline of the elements of the other crimes, particularly his definition of what constitutes murder, arguing that he selected a Canadian and not an international definition of this underlying offence.

[122] In the circumstances, the Court believes that it is useful to outline the constituant elements of the offences with which the appellant is charged.

[123] As we have seen, the *Act* confers on Canadian courts universal jurisdiction over genocide, crimes against humanity, and war crimes, and refers to international law for the elements thereof (subsection 6(3) of the *Act*).

[124] Therefore, in interpreting and defining these offences, as well as their underlying offences or acts, a Canadian court may take into account international law, including decisions of the international courts, as noted by the Supreme Court in *Mugesera* and in commentary (Lafontaine at 118 and 121–126, Robert J. Currie & Ion Stancu, "*R. v. Munyaneza*: Pondering Canada's First Core Crimes Conviction", (2010) 10 *Int'l. Crim. L. R.* 829; Madeleine J. Schwartz, "Prosecuting Crimes against Humanity in Canada: What Must be Proved", (2002) 46 *Crim. L.Q.* 40).

[125] In reality, doing otherwise would likely create a dichotomy potentially leading to impunity in Canada for acts committed abroad that are crimes under international law but not under Canadian law. Parliament's intent was to prevent such dichotomies, as it abolished the requirement that had existed before the *Act* in subsections 7(3.1) to (3.77) *Cr. C*. to demonstrate, in the prosecution for a crime against humanity or war crime, that the underlying offences were offences according to both international law and Canadian law.

[126] In such cases, Parliament's intent to refer to international law in such matters is also demonstrated by the use of the concept "intentional killing" in subsections 6(2) and 15(1) of the *Act* for the purposes of sentence and eligibility for parole. There is no concept of "intentional killing" in the *Criminal Code,* although it goes without saying that in Canadian law, murder requires proof of intent. The use of this notion distinguishes the *Act* from the *Criminal Code* in regard to sentencing, since an "intentional killing" committed in the circumstances described in the provision requires the offender to serve

at least twenty-five years of the sentence, while under the *Criminal Code,* such a fate is reserved only for those convicted of first degree murder.

[127] Admittedly, a superficial reading of subsection 2(2) of the *Act* could lead to the impression that the definition of the underlying offences must be that found in the *Criminal Code.* Such, however, is not the case. Admittedly, Parliament provides a list of prohibited underlying acts only for crimes against humanity, but it is recognized that genocide and war crimes are also composed of underlying acts that are similar in nature. For example, murder may constitute an offence underlying all three crimes, but it is explicitly mentioned only under crimes against humanity. Therefore, if murder is alleged as an underlying offence in a charge of genocide or war crimes, it must be defined according to international law, since the *Act* does not do so directly. In a case involving crimes against humanity, it would be illogical to assign it a different definition, one corresponding to Canadian criminal law, under the pretext that it is one of the underlying offences enumerated in the *Act.* A single underlying offence might therefore have two meanings depending on the crime alleged, which can potentially result in a new dichotomy, whereas coherence is what must be sought in the interpretation of the *Act*.

[128] To put it simply, save where it refers specifically to Canadian law, as in subsection 9(2) discussed above, the *Act* must be interpreted in a manner consistent with developments in international law, and to this end, the international definitions of crimes and their underlying offences must be applied.

[129] The *Rome Statute* is a crucial tool in this respect. In 1998, this instrument codified some material and intentional elements of genocide upon which there was a concenssus, crimes against humanity and war crimes, and thereafter jurisdiction over all of these crimes was attributed to the International Criminal Court (ICC). In addition, as subsection 6(4) of the *Act* indicates, the *Rome Statute* is not an exhaustive codification of international law and does not rule out the existence of similar crimes under existing or developing rules of international law.

Crimes against humanity: elements of the offence

[130] Unlike the provisions defining genocide and war crimes, subsection 6(3) of the *Act* provides a precise definition of the underlying acts that may become crimes against humanity. They are murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, and persecution. The list is not exhaustive, since any other act or omission that contravenes customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations may constitute a proscribed underlying act. Moreover, genocide does not require the existence of an armed conflict and thus may be committed during peace time.

[131] Like all crimes, crimes against humanity are composed of two elements: a criminal act and a guilty mind (*Mugesera* at para. 127).

[132] The criminal act includes three material elements: (i) one of the enumerated proscribed acts is committed; (ii) it is committed as part of a widespread or systematic attack; and (iii) the attack is directed against any civilian population or any identifiable group (*Mugesera* at para. 128).

[133] A guilty mind consists of two elements: (i) the mental element required for the underlying offence, and (ii) evidence that the accused was cognizant of the nexus between his act and the attack directed against a civilian population or identifiable group of persons (*Mugesera* at para. 174).

[134] It is appropriate here to consider each of these elements solely with regard to the offences underlying the two crimes against humanity for which the appellant has been convicted, *i.e*., murder and sexual violence.

(a) The material elements or actus reus of the proscribed acts

- Murder

[135] Relying on *Mugesera* and *Prosecutor v. Brdanin* (1 September 2004), Case No. IT-99-36-T (ICTY, Trial Chamber) the trial judge found that under international law, it was necessary to demonstrate (a) that the person was deceased, (b) that the accused caused the death through an act or omission or contributed significantly to the death, and (c) that the accused had the intent to cause the victim's death or to inflict serious injury that he knew was likely to cause death.

[136] Murder under international law thus differs from murder under Canadian law in one respect, since the latter requires a lower standard to establish a causal connection between the accused's conduct and the death. As Professor Lafontaine points out at page 127:

> In Canadian law, all that is required is that the conduct be a "contributing cause of death, outside the *de minimis* range" or, as rephrased in a later judgment by the majority of the Supreme Court, a "significant contributing cause". The Supreme Court explicitly rejected the terminology of "substantial cause" to describe the requisite degree of causation for all homicide offenses and indicated that this involved a "higher degree of legal causation".

[137] To remain consistent with the applicable law – i.e., international law – the higher standard of causation must be met. It follows that, with respect to causation, the prosecution must establish beyond any doubt that the act committed was a "substantial cause of death" ("*cause substantielle de la mort*") and not merely a "significant contributing cause of death" ("*cause ayant contribué de façon appréciable à la mort*").

- Sexual violence – rape

[138] The acts of sexual violence that the trial judge found to have occurred (paragraph 121 of his judgment) are the same as those he described in the section of the judgment on genocide:

> [TRANSLATION]
>
> [95] International jurisprudence, which does not differ from Canadian jurisprudence in this regard, defines sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive”
>
> [96] The following acts, among others, are considered sexual violence:
>
> (a) forcing a person to undress in public;
>
> (b) sexual penetration;
>
> (c) rape;
>
> (d) sexual molestation.
>
> [Citations omitted]

[139] As the judge emphasized, sexual violence has been defined by the *ad hoc* tribunals as "any act of a sexual nature which is committed on a person under circumstances which are coercive” (*Akayesu* at para. 598), which are defined as follows:

> 688 … coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. …

[140] Later, in *Prosecutor v. Dragoljub Kunarac* (12 June 2002) Case No. IT-96-23&23/1-A (ICTY, Trial Chamber), the victim’s lack of consent was found to be the determining element. It follows that, while the use of force or the threat of force may be used to establish lack of consent, it is not an element of rape, whereas lack of consent is.

[141] International jurisprudence, and the judgment in Akayesu in particular, recognizes that acts of sexual violence are more broadly defined than rape:

> 688. … The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence, far from being limited to physical invasion of the human body, may include acts which do not involve penetration or even physical contact. …

[142] As for the material elements of rape, one of the components of sexual violence, international jurisprudence has defined them as penetration, however slight, of the vagina and anus by the penis or any other object or of the mouth by the penis (*Prosecutor v. Anto Fuirundziia* (10 December 1998) Case No. IT-95-17/1-T (Trial Chamber) at para. 185; *Kunarac* at para. 127).

[143] These principles were reiterated in the first ICC decisions in such matters (*Prosecutor v. Germain Katanga and Mathieur Ngudjolo Chui* (30 September 2008) ICC-01/04-01/07, Decision on the confirmation of charges, at para. 440; *Prosecutor v. Jean-Pierre Bemba Gombo* (15 June 2009) ICC-01/05-01/08, Decision on the confirmation of charges, at para. 162).

[144] This constitutes the first element of the *actus reus*, namely, the content of the proscribed acts alleged here.

(b) Attack directed against a population or group

[145] The second material element is proof beyond any reasonable doubt of an attack against a civilian population or identifiable group of people.

[146] For this to be established, consideration must be given to a number of factors identified in international jurisprudence including, *inter alia*, the ethnic and political characteristics of a group. In *Mugesera*, the Supreme Court states:

> 161 The mere existence of a systematic attack is not sufficient, however, to establish a crime against humanity. The attack must also be directed against a civilian population. This means that the civilian population must be "the primary object of the attack", and not merely a collateral victim of it: *Kunarac*, Trial Chamber, at para. 421. The term "population" suggests that the attack is directed against a relatively large group of people who share distinctive features which identify them as targets of the attack: Mettraux, at p. 255.
>
> …
>
> 163 The Tutsi and moderate Hutu, two groups that were ethnically and politically identifiable, were a civilian population as this term is understood in customary international law. Mr. Duquette's findings of fact leave no doubt that the ongoing systematic attack was directed against them. For these reasons, we agree that at the time of Mr. Mugesera's speech, a systematic attack directed against a civilian population was taking place in Rwanda.

[147] In this case, it is established, indeed even admitted, that the Tutsis were an identifiable group of persons targeted by systematic attacks.

(c) The context in which acts were committed

[148] The third element of the *actus reus* of a crime against humanity is proof beyond any reasonable doubt that the alleged acts were committed as part of a widespread or systematic attack.

[149] The Crown must therefore show that the murders and sexual violence were part of a widespread or systematic attack against the Tutsis and that there was a link between them and this attack, as noted by the Supreme Court in *Mugesera*:

> 164 As we have seen, the existence of a widespread or systematic attack helps to ensure that purely personal crimes do not fall within the scope of provisions regarding crimes against humanity. However, because personal crimes are committed in all places and at all times, the mere existence of a widespread or systematic attack will not be sufficient to exclude them. To ensure their exclusion, a link must be demonstrated between the act and the attack which compels international scrutiny. For this reason, we must explore what it means for an act to occur "as part of" a widespread or systematic attack …

> 165 The requirement for a link between the act and the attack may be expressed in many ways. For instance, "in the context of" or "forming a part of" are common wordings. These phrases require that the accused's acts "be objectively part of the attack in that, by their nature or consequences, they are liable to have the effect of furthering the attack": Mettraux, at p. 251. In *Tadic*, the Appeals Chamber of the ICTY found that the acts of the accused must "comprise part of a pattern" of widespread or systematic abuse of civilian populations or must objectively further the attack (para. 248).
>
> …
>
> 167 ... In essence, the act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part of it. Thus, in *Kunarac*, where the three accused took advantage of a widespread and systematic attack to rape and sexually torture Muslim women and girls, the nexus requirement was made out: Trial Chamber, at para. 592. The accused knew of the attack, their acts furthered the attack directed against the Muslim population of Foca and they contributed to a pattern of attack against that population.
>
> [Emphasis added.]

[150] This question remains an objective one: was the act a part of the pattern of abuse or did it further the attack, whether or not personal motives existed (*Mugesera* at para. 166).

(d) The mental element or mens rea of the underlying offence

- Murder

[151] Article 30 of the *Rome Statute* describes the mental element of an act as follows:

2. For the purposes of this article, a person has intent where:	2. Il y a intention au sens du présent article lorsque :
(a) In relation to conduct, that person means to engage in the conduct;	a) Relativement à un comportement, une personne entend adopter ce comportement ;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.	b) Relativement à une conséquence, une personne entend causer cette conséquence ou est consciente que celle-ci adviendra dans le cours normal des événements.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.	3. Il y a connaissance, au sens du présent article, lorsqu'une personne est consciente qu'une circonstance existe ou qu'une conséquence adviendra dans le cours normal des événements. « Connaître » et « en connaissance de cause »

s'interprètent en conséquence.

[152] Since the *Rome Statute* is a codification of the customary international law governing criminal law matters at the time of its adoption, i.e., in July of 1998, it would not be appropriate to apply this criterion here.

[153] Rather, the standard that existed at the time of the events in 1994 is what must be applied. The *mens rea* of murder according to international law at the time was similar to that under Canadian Law in paragraph 229(*a*) of the *Criminal Code*:

229. Culpable homicide is murder	229. L'homicide coupable est un meurtre dans l'un ou l'autre des cas suivants :
(a) where the person who causes the death of a human being	a) la personne qui cause la mort d'un être humain :
(i) means to cause his death, or	(i) ou bien a l'intention de causer sa mort,
(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;	(ii) ou bien a l'intention de lui causer des lésions corporelles qu'elle sait être de nature à causer sa mort, et qu'il lui est indifférent que la mort s'ensuive ou non;

- Sexual violence

[154] In customary international law, the *mens rea* for sexual violence and even for rape is similar to that for sexual assault under Canadian law, particularly with respect to knowledge of the victim's lack of consent.

[155] In *Kunarac* at paragraph 127, the Appeals Chamber found that "[t]he *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim".

[156] In *Prosecutor v. Semanza* (15 May 2003) Case No. ICTR-97-20-T (ICTR, Trial Chamber), the ICTR, basing itself on the decisions in *Akayesu* and *Kunarac*, found that the mental element of rape as an underlying offence to crimes against humanity "is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim" (para. 346).

[157] In 2006, the judgment in *Prosecutor v. Gacumbitsi* (7 July 2006) Case No. ICTR-01-64-A (ICTR, Appeals Chamber), followed the guidance in *Kunarac* and stated:

> 157 As to the accused's knowledge of the absence of consent of the victim, which as *Kunarac* establishes is also an element of the offence of rape, similar reasoning applies. Knowledge of nonconsent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.

[Emphasis added.]

(e) The specific criminal intent of crimes against humanity

[158] In *Mugesera*, the Supreme Court stated that evidence of discriminatory intent is not required for all crimes against humanity, but that it must be shown that the accused not only had the intent to commit the underlying offence but also that he was aware of the attack and knew that his act was part of it:

> 173 The question of whether a superadded mental element exists for crimes against humanity was a point of significant contention in *Finta*. Cory J., for the majority, found that the accused must have an awareness of the facts or circumstances which would bring the act within the definition of a crime against humanity (p. 819). La Forest J. penned dissenting reasons suggesting that establishing the mental element for the underlying act was sufficient in itself and thus no additional element of moral blameworthiness was required (p. 754). At the time, there was little international jurisprudence on the question. It is now well settled that in addition to the *mens rea* for the underlying act, the accused must have knowledge of the attack and must know that his or her acts comprise part of it or take the risk that his or her acts will comprise part of it: see, e.g., *Tadic*, Appeals Chamber, at para. 248; *Ruggiu*, at para. 20; *Kunarac*, Trial Chamber, at para. 434; *Blaskic*, at para. 251.
>
> [Emphasis added.]

[159] This additional mental element is defined in *Mugesera* as follows:

> 174 It is important to stress that the person committing the act need only be cognizant of the link between his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard: *Kunarac*, Appeals at para. 103. Even if the person's motive is purely personal, the act may be a crime against humanity if the relevant knowledge is made out.
>
> 175 Knowledge may be factually implied from the circumstances: *Tadic*, Trial Chamber, at para. 657. In assessing whether an accused possessed the requisite knowledge, the court may consider the accused's position in a military or other government hierarchy, public knowledge about the existence of the attack, the scale of the violence and the general historical and political environment in which the acts occurred: see, e.g., *Blaskic*, at para. 259. The accused need not know the details of the attack: *Kunarac*, Appeals at para. 102.
>
> [Emphasis added.]

[160] In conclusion, in the assessment of the mental element of crimes against humanity, the context in which the accused acted must be considered. While the accused need not have the specific intent to attack members of the targeted group, his consciousness or knowledge of the link between his act and the widespread or systematic attack must be determined.

* * * * *

[161] In short, to paraphrase para. 119 of *Mugesera*, under the *Act* and the principles of international law, a proscribed act rises to the level of a crime against humanity when four elements are made out:

1. An enumerated proscribed act was committed (this involves showing that the accused committed the underlying criminal act and had the requisite guilty state of mind for the underlying act);
2. The act was committed as part of a widespread or systematic attack;
3. The attack was directed against a civilian population or an identifiable group of persons; and
4. The perpetrator of the proscribed act knew of the attack and was aware that or reckless as to whether there was a link between his act and the attack, even if he was not aware of the details.

Genocide: elements of the offence

[162] *The Genocide Convention* is the codification of customary international law (*Akayesu* at para. 495, Guénaël Mettraux at 199 et seq.). It defines the crime as follows:

Article 1	*Article premier*
The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.	Les Parties contractantes confirment que le génocide, qu'il soit commis en temps de paix ou en temps de guerre, est un crime du droit des gens, qu'elles s'engagent à prévenir et à punir.
Article 2	*Article II*
In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:	Dans la présente Convention, le génocide s'entend de l'un quelconque des actes ci-après, commis dans l'intention de détruire, ou tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel :
(a) Killing members of the group;	a) Meurtre de membres du groupe;
(b) Causing serious bodily or mental harm to members of the group;	b) Atteinte grave à l'intégrité physique ou mentale de membres du groupe;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its	c) Soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa

physical destruction in whole or in part;	destruction physique totale ou partielle;
(d) Imposing measures intended to prevent births within the group;	d) Mesures visant à entraver les naissances au sein du groupe;
(e) Forcibly transferring children of the group to another group.	e) Transfert forcé d'enfants du groupe à un autre groupe.
Article 3	*Article III*
The following acts shall be punishable:	Seront punis les actes suivants :
(a) Genocide;	a) Le génocide;
(b) Conspiracy to commit genocide;	b) L'entente en vue de commettre le génocide;
(c) Direct and public incitement to commit genocide;	c) L'incitation directe et publique à commettre le génocide;
(d) Attempt to commit genocide;	d) La tentative de génocide;
(e) Complicity in genocide.	e) La complicité dans le génocide.
[Emphasis added.]	

[163] The *Genocide Convention* sets out two liability regimes, one for the States parties, which is similar to a civil regime, and the other for individuals, which is a criminal regime:

Article 4	Article IV
Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.	Les personnes ayant commis le génocide ou l'un quelconque des autres actes énumérés à l'article III seront punies, qu'elles soient des gouvernants, des fonctionnaires ou des particuliers.

[164] The *Act* restates the element of intent to destroy an identifiable group, then refers to its own subsection 6(3) as well as to both customary and conventional international law:

"genocide" means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the	« génocide » Fait — acte ou omission — commis dans l'intention de détruire, en tout ou en partie, un groupe identifiable de personnes et

time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

[165] To identify the underlying offences and their elements, therefore, we must turn to conventional international law, essentially the *Genocide Convention* and international jurisprudence (*Mugesera* at paras. 82–83).

[166] In this appeal, the two offences alleged are murder and serious harm to the physical or mental integrity of the victims.

(a) The underlying offences

- Murder

[167] The *actus reus* and the *mens rea* of murder as an underlying offence of genocide do not differ from these elements as described above regarding crimes against humanity. It should be added that the number of murders is not a determinative factor.

- Serious harm to physical or mental integrity

[168] The ICTR has on numerous occasions considered the interpretation of serious physical or mental harm to a member of an identifiable group (*Akayesu*; *Semanza*; *Prosecutor v. Kayishema and Ruzindana* (21 May 1999), Case No. ICTR-95-1-T (Trial Chamber II); *Kunarac* (Appeals Chamber). In those cases, it concluded that such harm could be constituted by physical or mental torture, inhumane or degrading treatment, rape, or sexual violence. The jurisprudence adds that the harm need not cause permanent and irremediable damage.

[169] To demonstrate that the proscribed act has been committed, the prosecution must prove that one or more victims have suffered physical or mental harm. As for the *mens rea,* the accused must have had the intent to cause this harm.

[170] In this case, the Crown alleged the commission of rapes. The *actus reus* and the *mens rea* of rape as an underlying offence to genocide do not differ from these elements as described above in connection with crimes against humanity.

(b) The additional elements specific to genocide

[171] The specific elements of the offence of genocide are both material and mental. The prosecution must establish first, that the alleged acts were committed against an indentifiable group and second, the intent to destroy, in whole or in part, this group

(Gabrielle Dion, Maude Matin-Chantal & Marlene Yahya Haage, “La double attribution de la responsabilité en matière de genocide” (2007 20.2 R.Q.D.I. 173).

[172] An identifiable group may be characterized by national, ethnic, racial, or religious criteria. The identification of the protected or identifiable group must be assessed on a case-by-case basis by reference to the objective particulars of a given social or historical context, and by the subjective perceptions of the perpetrators (*Semanza* at para. 317).

[173] The international jurisprudence has found on numerous occasions that the Tutsi population constitutes an identifiable ethnic group within the meaning of the definition of genocide (*Niyitegeka* at para. 419; *Akayesu* at para. 702). Similarly, in *Mugesera* at paras. 11 et seq., the Supreme Court used the contextual approach to recognize the ethnic character of the Tutsi population.

[174] As for the mental element of genocide, before analyzing the international jurisprudence, it should be pointed out that the English and French versions of the Act differ. The former includes the expression “as such”, while the second does not use the equivalent “*comme tel*”, which is in contrast found in all of the genocide treaties:

> “genocide” means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
>
> « génocide » Fait — acte ou omission — commis dans l’intention de détruire, en tout ou en partie, un groupe identifiable de personnes et constituant, au moment et au lieu de la perpétration, un génocide selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d’après les principes généraux de droit reconnus par l’ensemble des nations, qu’il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
>
> [Emphasis added.]

[175] In the view of the Court, Parliament’s intent is to reflect international law, which places a great deal of emphasis on the descriptive term “as such” or the French “*comme tel*”, which is found in international treaties (Lafontaine at 162–163). It follows that the English version should prevail here, and indeed, the trial judge recognized that this expression was an integral part of the *mens rea* of genocide.

[176] Thus, the act must have been committed with the specific intent to destroy, in whole or in part, an identifiable group of people “as such” or “per se”. In *Ayakesu*, the ICTR defined this specific intent as follows:

> 498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

[177] It follows that the proscribed act must have been committed against a person precisely because that person was part of the identifiable group, thus conflating the individual with that group (*Akayesu* at para. 521; *Prosecutor v. Élizer Niyitegeka* (16 May 2003) Case No. ICTR-96-14-T (ICTR, Trial Chamber) at para 410).

[178] Because specific intent is required, recklessness and negligence cannot be considered part of the mental element of the crime of genocide (Antonio Cassese at 103; Robert J. Currie at 109).

[179] Finally, while a genocidal policy or specific plan to carry it out may constitute a significant fact, it need not be proved.

(c) The differentiation between genocide and crimes against humanity

[180] Several underlying offences can be identified as either crimes against humanity or as genocide. Professor Cassese goes so far as to say that the two categories of crime overlap (*supra* at 106).

[181] Although it was initially found that genocide could constitute part of a crime against humanity, it is now clearly distinct unto itself. Objective and subjective factors differentiate the two, although they are similar, to say the least.

[182] First, both types of crime may be based on the same proscribed act, but crimes against humanity are broader in scope. For example, crimes against humanity include torture or arbitrary imprisonment, but that is not necessarily the case with genocide.

[183] Second, the mental elements are not the same. In the case of crimes against humanity, in addition to the elements of the underlying offence, knowledge of the existence of a widespread or systematic attack and the link between the underlying offence and the attack must be proved. In the case of genocide, apart from the elements of the underlying offence, it is also necessary to prove the intent to destroy, in whole or in part, an identifiable group of people.

War crimes - elements of the offence

[184] Just as with crimes against humanity, there are few observable differences between the definition of war crimes in subsection 6(3) of the *Act* and that in the former provision of the *Criminal Code*, save for the nature of the conflict:

Act: "war crime" means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary	*Loi* : « crime de guerre » Fait — acte ou omission — commis au cours d'un conflit armé et constituant, au moment et au lieu de la perpétration, un crime de guerre selon le droit

international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.	international coutumier ou le droit international conventionnel applicables à ces conflits, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.
Criminal Code: "war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at the time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.	*Code criminel*: « crime de guerre » Fait -- acte ou omission -- commis au cours d'un conflit armé international -- qu'il ait ou non constitué une transgression du droit en vigueur à l'époque et au lieu de la perpétration -- et constituant, à l'époque et dans ce lieu, une transgression du droit international coutumier ou conventionnel applicable à de tels conflits.

[Emphasis added.]

[185] Under the *Criminal Code* and the *Geneva Conventions Act*, R.S.C. 1985, c. G-3, only serious offences could be prosecuted before Canadian courts. Section 4, which is common to the *Geneva Conventions*, *Protection of civilian persons and populations in time of war* (*GC IV*, 12 August, 1949, article 147) provides a restrictive definition of these offences:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or	Les infractions graves visées à l'article précédent sont celles qui comportent l'un ou l'autre des actes suivants, s'ils sont commis contre des personnes ou des biens protégés par la Convention : l'homicide intentionnel, la torture ou les traitements inhumains, y compris les expériences biologiques, le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique ou à la santé, la déportation ou le transfert

wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. [Emphasis added.]	illégaux, la détention illégale, le fait de contraindre une personne protégée à servir dans les forces armées de la Puissance ennemie, ou celui de la priver de son droit d'être jugée régulièrement et impartialement selon les prescriptions de la présente Convention, la prise d'otages, la destruction et l'appropriation de biens non justifiées par des nécessités militaires et exécutées sur une grande échelle de façon illicite et arbitraire.

[186] The adoption of the *Act* had the effect of broadening the scope of war crimes so that offences committed during a non-international armed conflict could be prosecuted if it was proved that, at the time they were committed, they were crimes under customary or conventional international law (Lafontaine at 172).

[187] For the reasons outlined above, the Court finds that murder, rape or sexual violence, and pillage were underlying offences that could give rise to war crimes in 1994.

[188] To prove that a war crime has been committed, in addition to the material and mental elements of the underlying offence, the following contextual elements must be established:

- an armed conflict, whether international or not;
- offences committed against persons who did not take part or who had ceased to take part in the armed conflict, or in other words, protected persons;
- a nexus between the offences committed and the armed conflict; and
- the accused's knowledge of this nexus.

(a) The elements of the underlying offences

- Murder

[189] The *actus reus* and the *mens rea* of murder as an underlying offence to war crimes do not differ from these elements as described above in connection with crimes against humanity.

- Rape and sexual violence

[190] The *actus reus* and the *mens rea* of rape and sexual violence as underlying offences to war crimes do not differ from these elements as described above in connection with crimes against humanity.

- Pillage

[191] The offence of pillage set out in paragraph 4(2)(*g*) of *Protocol II* contemplates both organized and individual activities, and applies to the pillage of any type of property, either private or public.[6] Article 4 of *Protocol II* is an integral part of the *ICTR Statute*, U.N. Doc. S/RES/955, 8 November 1994, criminalizing pillage but without defining it. Pursuant to paragraph 3(*e*) of the *ICTY Statute*, U.N. Doc. S/RES/827, 25 May 1993, the "plunder" (a synonym of pillage, as pointed out in *Kunarac*; see below) of public or private property is a violation of the laws and customs of war.

[192] In *Jelisic* at para. 48, the ICTY found that plunder consists in "the fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto". Thus, "individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators".

[193] In *Delalic,* the ICTY, at para. 590, found that "the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property …".

[194] In *Kunarac*, the ICTYdefined "plunder", with reference to "pillage":

> 15. The word “plunder” in its ordinary meaning suggests that more than the theft of property from one person or even from a few persons in the one building is required. Plunder is synonymous with “pillage”, which more clearly emphasises that there must be theft involving a more extensive group of persons or a pattern of thefts over some identifiable area such as, for example, the Muslim section of a village or town or even a detention centre. The *Celebici Judgment* held that plunder included unjustified appropriations both by individual soldiers for their private gain and by the organised seizures within the framework of a systematic exploitation of enemy property. In *Prosecutor v Blaskic*, the accused’s conviction for plunder was based upon the large-scale activities of his subordinates over a widespread geographical area. Neither judgment therefore found it necessary to consider whether plunder requires the thefts to be widespread.
>
> 16. Nevertheless, in the view of the Trial Chamber, the use of the word “plunder” in Article 3(*e*) of the Statute refers to its ordinary meaning of involving unjustified appropriations of property either from more than a small group of persons or from persons over an identifiable area such as already described. This interpretation is more consistent with plunder being a violation of the laws or customs of war. It is inappropriate to include within that term a theft from only one person or from only a few persons in the one building. There is no evidence in

[6] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, *Final Act of the Diplomatic Conference of Geneva of 1974-1977*, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, Commentary, 1978, at para. 4542, online: http://www.icrc.org/applic/ihl/ihl.nsf/COM/475-760008?OpenDocument&xp_articleSelected=760008

> the present case which satisfies the interpretation adopted. There will therefore be a judgment of acquittal in favour of *Kunarac* on Count 13.
>
> [Emphasis added; citations omitted.]

[195] This approach was also taken in *Prosecutor v. Hadzihsanovic* (15 March 2006) Case No. IT-47-01-T (ICTY, Trial Chamber), where the Tribunal defined the scope of plunder:

> 49. The Chamber considers that the elements of the offence of plunder exist when public or private property is acquired illegally and deliberately. This crime covers "all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillage" and extends to "both widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners and isolated acts of theft or plunder by individuals for their private gain."
>
> 50. The *mens rea* element of the offence of plunder of public or private property is established when the perpetrator of the offence acts with the knowledge and intent to acquire property unlawfully, or when the consequences of his actions are foreseeable.
>
> …
>
> 54. The Chamber considers that to constitute an offence punishable by Article 3 of the Statute, the plunder of public or private property need not be carried out in the context of military action. It suffices for the offence stipulated in Article 3(e) of the Statute to be closely linked to the hostilities.
>
> 55. The Chamber recalls that the crime of plunder of public or private property must satisfy the conditions for applying Article 3 of the Statute, particularly the condition regarding the gravity of the offence. That last condition is met when the plundered property is of sufficient value that its unlawful appropriation involves grave consequences for the victims. In *Tadić*, the Appeals Chamber illustrated the concept of gravity by explaining that although the fact that a combatant's appropriation of a loaf of bread in an occupied village might fall under the principle laid down in Article 46 of the Hague Regulations whereby private property must be respected by any army occupying an enemy territory, that act would not amount to a serious violation of international humanitarian law. The Chamber agrees with the opinion expressed in *Naletilić* that the crime of plunder can result not only from the fact the "victim suffers severe economic consequences," but also from "the reiteration of the acts and from their overall impact". The seriousness of the violation must be ascertained on a case-by-case basis, taking into consideration the circumstances of the crime.
>
> [Emphasis added; citations omitted.]

[196] What distinguishes ordinary theft from plunder or pillage is the context surrounding its commission. Therefore, it must be demonstrated that the plunder or pillage of public or private property was carried out in the context of an armed conflict and that the accused had knowledge of the existence of an armed conflict and the intent to acquire the property. While the extent of the pillage need not involve all of the

buildings in a town or place, its context must nevertheless be proved to establish that it was a serious violation of international law. In the *Rome Statute*, the use of the expression “pillaging a town or place, even when taken by assault” does not mean that the pillage must affect the entire town or place, since its list of serious violations is not exhaustive. Moreover, Article 6(*b*) of the *Nuremberg Charter* refers to the plunder of public or private property, a notion that was reiterated in the international jurisprudence cited in the preceding paragraphs.

[197] Finally, the victim of the theft must be a protected person, thus someone who did not take part or who had ceased to take part in the hostilities.

(b) The nexus between the underlying offences and the armed conflict

[198] The ICTR Trial Chamber and Appeals Chamber have both dealt with the nexus requirement.

[199] In *Semanza*, the Trial Chamber confirmed that any person may be found guilty of war crimes, whether or not that person acted under orders or in the furtherance of official army activities:

> 358. Article 4 of the Statute provides that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed serious violations of [Common Article 3 and Additional Protocol II]." The Appeals Chamber of this Tribunal recently pointed out that "Article 4 makes no mention of a possible delimitation of classes of persons likely to be prosecuted under this provision."
>
> 359. Common Article 3 and Additional Protocol II similarly do not specify classes of potential perpetrators, rather they indicate who is bound by the obligations imposed thereby. In the case of Common Article 3, that is "each Party to the conflict". The ICRC Commentary on Additional Protocol II simply says that the field of application *ratione personae* includes "those who must, within the meaning of the Protocol, conform to certain rules of conduct with respect to the adversary and the civilian population".
>
> 360. Indeed, further clarification in respect of the class of potential perpetrators is not necessary in view of the core purpose of Common Article 3 and Additional Protocol II: the protection of victims. In the view of the ICTR Appeals Chamber, the protections of Common Article 3 imply effective punishment of perpetrators, whoever they may be. In its Judgement in the *Akayesu* case, the Appeals Chamber held that the Trial Chamber erred on a point of law when it restricted the application of Common Article 3 to a certain category of perpetrators. Specifically, the category of persons in question in the Trial Chamber's Judgement consisted of members of the armed forces "under the military command of either of the belligerent parties, [and] . . . individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts.
>
> [Emphasis added.]

[200] *Georges Anderson Nderubumwe Rutaganda v. Prosecutor* (26 May 2003) Case No. ICTR-96-3-A (ICTR, Appeals Chamber), rendered only a few days after *Semanza*, confirms the position taken by the ICTY and the ICTR Trial Chambers:

> 569. The Appeals Chamber of the ICTR has not previously endorsed a particular definition of the nexus requirement. The Appeals Chamber of the ICTY has done so twice. The first time, in the *Tadic* Jurisdiction Decision, the Appeals Chamber stated that the offences had to be "closely related" to the armed conflict, but it did not spell out the nature of the required relation. In the *Kunarac* Appeal Judgement, it endorsed the same standard. It then provided the following details, which appear relevant to the Prosecution appeal in this case:
>
> > 58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.
> >
> > 59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.
>
> 570. This Chamber agrees with the criteria highlighted and with the explanation of the nexus requirement given by the ICTY Appeals Chamber in the *Kunarac* Appeal Judgement. It is only necessary to explain two matters. First, the expression "under the guise of the armed conflict" does not mean simply "at the same time as an armed conflict" and/or "in any circumstances created in part by the armed conflict". For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the Statute. By contrast, the accused in *Kunarac*, for example, were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part. Second, as paragraph 59 of the *Kunarac* Appeal Judgement indicates, the determination of a close relationship between particular offences and an armed conflict will usually

> require consideration of several factors, not just one. Particular care is needed when the accused is a non-combatant.
>
> [Emphasis added; citations omitted.]

[201] Thus, the *ad hoc* tribunals have accepted a certain number of contextual elements to determine whether there is a nexus. Accordingly, a demonstration of the nexus does not require the war crimes to have been committed in a determined geographical territory or over a short or long period of time; the crimes are not limited to offences of a purely military nature; it is not a requirement that the accused be linked to one of the parties to the conflict and his or her actions need not be interconnected with other crimes committed in the context of that conflict; finally, the war crimes need not be pursuant to an officially sanctioned practice of one of the parties to the conflict.

[202] The elements identified by the *ad hoc* tribunals to serve in the determination of a nexus are summarized by Mettraux at 46:

> (i) the status of the perpetrator (as soldier or combatant);
>
> (ii) the status of the victim or victims (as a non-combatant);
>
> (iii) the circumstances in which the crime was committed;
>
> (iv) the fact that the crime was committed in the context of an ongoing campaign to achieve particular military goals;
>
> (v) the fact that the crime coincided with the ultimate purpose of the military campaign;
>
> (vi) the fact that the crime was committed with the assistance or with the connivance of the warring parties;
>
> (vii) the fact that the crime was committed as part of, or in the context of, the perpetrator's official duties;
>
> (viii) the fact that the victim was a member of the forces of the opposing party.
>
> [Citations omitted.]

[203] None of these criteria when taken individually is conclusive evidence that a war crime has been committed. Answering this question requires that they be considered as a whole.

[204] In *Rutaganda*, the ICTR Appeals Chamber found that the accused was guilty of war crimes because of two massacres committed as part of the armed conflict in Rwanda, given his general connection with armed groups, including the *Interahamwe*:

> 564. … In support of this contention, the Prosecution refers to conclusions reached by the Trial Chamber in considering the issue as to whether Rutaganda was among the persons to whom responsibility could be imputed under Article 4(a) of the Statute – an issue which the Appeals Chamber subsequently found to be unnecessary to prove for establishing responsibility for such violations. The relevant passages of the Trial Judgement read as follows:

> 439. The Accused was in a position of authority vis-à-vis the *Interahamwe* militia. Testimonies in this case have demonstrated that the Accused exerted control over the *Interahamwe*, that he distributed weapons to them during the events alleged in this Indictment, aiding and abetting in the commission of the crimes and directly participating in the massacres with the *Interahamwe*. The expert witness, Mr. Nsanzuwera, testified that the *Interahamwe* militia served two roles during April, May and June 1994, on the one hand, they supported the RAF war effort against the RPF, and on the other hand, they killed Tutsi and Hutu opponents.
>
> 440. Moreover, as testified by Mr. Nsanzuwera, there is merit in the submission of the Prosecutor that, considering the position of authority of the Accused over the *Interahamwe*, and the role that the *Interahamwe* served in supporting the RAF against the RPF, there is a nexus between the crimes committed and the armed conflict. In support thereof, the Prosecutor argues that the *Interahamwe* were the instrument of the military in extending the scope of the massacres.
>
> 441. Thus, the Chamber is also satisfied that the Accused, as second vice-president of the youth wing of the MRND known as the *Interahamwe za MRND* and being the youth wing of the political majority in the government in April 1994, falls within the category of persons who can be held responsible for serious violations of the provisions of Article 4 of the Statute.
>
> 565. Finally, in tying these general claims to the specific crimes charged in Counts 4 and 6 of the Indictment, the Prosecution recounts the evidence at trial showing that the *Interahamwe* took a lead role in the killings charged in those counts with the support of RAF soldiers and that Rutaganda took part as a leader of the *Interahamwe*.

[205] The Appeals Chamber, at para. 577, accepted the findings of the Trial Chamber in its analysis of the first massacre, noting the following elements:

- Rutaganda participated in the attack on Tutsi refugees at the ETO school;
- He exercised *de facto* influence and authority over the *Interahamwe*;
- The *Interahamwe* were armed with guns, grenades, and clubs;
- The *Interahamwe*, alongside the soldiers of the Presidential Guard, entered the ETO compound throwing grenades, firing guns and killing the refugees with machetes and clubs; and
- The victims of the killings were persons protected under common Article 3 of the Geneva Conventions and Additional Protocol II.

[206] Thus, it is not necessary for the accused to be an official, an armed combatant, a police officer, or a soldier to be convicted of a war crime. It is sufficient if the involvement in the abuses committed is more than accidental.

[207] In this case, the evidence reveals that the appellant is an educated man, a member of the local elite, that he was clearly a part of the campaign to destroy the Tutsis, in fact affiliating himself with the *Interahamwe* groups to such a degree that he exercised a certain influence over them.

THE JUDGE'S ASSESSMENT OF THE EVIDENCE

[208] Before addressing the appellant's numerous complaints concerning the assessment of the evidence, it is useful to note that the Supreme Court of Canada has consistently held that appellate review of the assessment of evidence must be conducted within two well-established boundaries (see, for example, *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180).

[209] First, an appellate court must give due weight to the advantages of the trier of fact, who took part in the trial and saw and heard the testimony. A reviewing court should therefore refrain from interfering with the trial judge's findings of fact unless the appellant can demonstrate a palpable and overriding error in the judge's assessment of the evidence or a failure on the part of the judge to consider a significant part of the evidence.

[210] Second, the reviewing court must nevertheless weigh the evidence and consider whether, through the lens of its own experience, judicial fact-finding precludes the conclusion reached by the trier of fact – or in other words, whether the verdict is reasonable in light of the evidence.

[211] If the judge has ignored legal rules in applying his or her own analysis to the evidence, however, and this error might have influenced the verdict, the appellate court must intervene.

* * * * *

[212] The appellant's complaints may be grouped into two categories: the general, to which the appellant frequently refers in his analysis of the evidence, and those specifically concerning certain Crown witnesses.

[213] The first category encompasses: (i) the failure to give a *Vetrovec* warning; (ii) the failure to apply the rules respecting the reliability of identification evidence; and (iii) the failure to take into account the risk of contamination of or collusion amongst the Crown's witnesses.

(i) The Vetrovec warning

[214] In *Vetrovec v. R.*, [1982] 1 S.C.R. 811, the Supreme Court noted that where there are factors likely to seriously impair the credibility of a witness, whoever it may be, the judge must warn the jurors regarding the dangers of relying on this witness alone.

[215] Along the same lines, in *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, the Supreme Court states:

> 2 The evidence of a single witness is nonetheless sufficient in Canada to support a conviction for any offence other than treason, perjury or procuring a feigned marriage. Many serious crimes might otherwise go unpunished. But

> where the guilt of the accused is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or veracity, the danger of a wrongful conviction is particularly acute.
>
> 3 It is therefore of the utmost importance, in a trial by judge and jury, for the jury to understand when and why it is unsafe to find an accused guilty on the unsupported evidence of witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted". For present purposes, I use these terms interchangeably.
>
> 4 I hasten to add that a specific instruction is sometimes required in this regard not because jurors are thought to be unintelligent, but rather because they might otherwise be uninformed. It is meant to bring home to lay jurors the accumulated wisdom of the law's experience with unsavoury witnesses. Judges are alert to the concern that unsavoury witnesses are prone to favour personal advantage over public duty. And we know from recent experience that unsavoury witnesses, especially but not only "jailhouse informants", can be convincing liars and can effectively conceal their true motives for testifying as they have: see *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), at para. 76.
>
> …
>
> 11 The central purpose of a *Vetrovec* warning is to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony. In appropriate cases, the trial judge should also draw the attention of the jurors to evidence capable of confirming or supporting the material parts of the otherwise untrustworthy evidence.

[216] The trial judge responded to the appellant's concerns regarding the credibility of certain unsavoury witnesses and the need for him to caution himself in the manner prescribed in *Vetrovec*. He wrote:

> [TRANSLATION]
>
> [1922] The Court, sitting without a jury, is aware of the potential dangers of such testimony. Hence, it is after careful study of the evidence that the Court concludes there is no reason to objectively believe that those versions are not trustworthy in terms of the specific facts related, the evidence of which is damning for the accused. Furthermore, as we will see in the analysis that follows, their testimony is amply corroborated by numerous credible and reliable witnesses who testified for the prosecution and the defence.
>
> [1923] Ultimately, the Court saw and heard those witnesses and believes elements of their testimony, as explained for each of them in the framework of this judgment.
>
> [1924] The objective of any judgment is to explain the decision to the parties, to render account before society and to allow a true examination in appeal. To that end, the Court is compelled to strictly respect the law and the jurisprudence, and examines comprehensively the witnesses' credibility problems and the importance of each testimony.

[217] The appellant argues that, while the judge may have warned himself, he nevertheless failed to apply this warning to the specific weaknesses in the evidence, particularly with respect to the testimony of RCW-7, 8, 9, 10, 11, 12, 13 and 14.

[218] This argument is unfounded. It cannot be assumed that the trial judge failed to consider the elements that led him, rightly or wrongly, to doubt the reliability of some of the witnesses. On the contrary, as we shall see further on, he took note of the weaknesses in the testimony and explained his decision to accept them nevertheless, either in whole or in part.

(iii) The identification evidence

[219] It is recognized in case law that eyewitness identification evidence has inherent risks. Appellate courts have accordingly developed a series of factors to aid in determining whether it is appropriate to interfere with a verdict that relied on such evidence, even when it was rendered by a judge sitting alone:

- Whether the trial judge can be taken to have instructed himself or herself regarding the frailties of eyewitness testimony;
- Whether the trial judge reviewed the evidence with such an instruction in mind;
- Whether there is other evidence that can be considered to confirm this identification;
- The nature of the eyewitness observation, the reliability of the witnesses, and the degree to which they know the person they are identifying;
- The timing of the prior identification and in its context, including factors such as the strengthening of the identification by inappropriate police remarks or actions.

(See, for example *Legault v. R*, 2013 QCCA 1264; *R.* v. *Bigsky*, 2006 SKCA 145).

[220] Those are the principles. Here is how the trial judge dealt with the identification evidence:

> [TRANSLATION]
>
> [1936] After hearing all the evidence, I conclude beyond a reasonable doubt that the accused, Désiré Munyaneza, was indeed the person referred to by the prosecution witnesses.
>
> [1937] The witnesses who testified outside Canada identified him in a photo line-up constituted and presented in accordance with Canadian law: independence and freedom of judgment of the witness, a series of photos presented one after the other, no leading of the witness, and so on.
>
> [1938] The witnesses heard at the hearing identified the accused in the dock. I'm quite willing to warn myself against the danger of such a method of identification, but I saw and heard the witnesses, and was convinced.

> Furthermore, most of the witnesses had recognized the accused previously in a police line-up.
>
> [1939] The accused was a well-known man in Butare and had a major scar on his face, to which most of the witnesses referred.
>
> [1940] The prosecution's evidence as a whole, to which I refer more specifically in the section entitled "The facts" (including the confidential appendix), convince me beyond a reasonable doubt that the accused is the perpetrator of the alleged crimes.

[221] While these comments are quite general, the analysis of the identification evidence reveals that the threshold of objective reliability was reached.

[222] First, as the judge points out, a photo lineup was presented out of court and in accordance with Canadian law to all of the Crown witnesses. Most of the witnesses identified the appellant:

- Several did so unequivocally during the first lineup. RCW-2, RCW-3, RCW-4, RCW-5, RCW-6, RCW-7, RCW-8, RCW-10, RCW-11, RCW-12, RCW-13, C-18 and C-22;
- Others, after some hesitation during the first lineup, positively identified him during the second: C-15 and C-20;
- Finally, some identified the correct photo, saying that he [TRANSLATION] "resembled" the appellant: RCW-9 ([TRANSLATION] "I think it must be this one") C-19 ([TRANSLATION]"this face looks familiar to me, it's the only one that's familiar", C-23 ([TRANSLATION] "this one looks like Munyagasheke's son who has a scar on his cheek") and C-24 ([TRANSLATION] "I think it's that one.")

[223] With regard to RCW-14, C-16, and C-17, the only three witnesses for the Crown who were not able to identify the appellant out of court from a lineup, they all affirmed, as did the other Crown's witnesses, that the appellant had a very prominent scar on his face. This distinguishing mark was not apparent on the photo used during the photo lineups. Moreover, RCW-14 identified the appellant's photo while testifying at the rogatory commission, when the appellant was not present.

[224] Second, the existence of an unusual distinguishing mark, a scar on his face, that was mentioned by practically all of the witnesses renders the identification of the appellant objectively more reliable. The scar even earned him the nickname "*Gikovu*" ([TRANSLATION] "scarface"), which the witnesses who had taken refuge at the prefectural office used on several occasions. This highly distinguishing mark made it possible to distinguish the appellant from the other assailants and minimizes the risk of the witnesses having confused him with another person.

[225] Finally, it should be pointed out that many witnesses from different parts of the prefecture of Butare who related incidents with no relation to each other described the appellant's manner of dress in relatively the same way, saying that he was generally wearing a [TRANSLATION] "camouflage" pattern military-style sweater or shirt and a

[TRANSLATION] "civilian" or [TRANSLATION] "ordinary" pair of jeans (testimonies of RCW-5, RCW-6, RCW-9, RCW-10, RCW-11, RCW-12, RCW-13, RCW-14, C-23 and C-24). Although not conclusive (it may be assumed that the appellant did not wear the same clothes from April to July of 1994 and that he was not the only one wearing a military sweater with civilian pants), this evidence nevertheless supports the idea that the witnesses were referring to the same individual.

(iii) Contamination and collusion

[226] The appellant's argument that the witnesses were tainted due to collusion amongst them is based on three allegations:

- Some of the witnesses took part in *Gacaca* meetings, which are assemblies in which Rwandans are called on to share their experiences during the genocide;
- Five witnesses detained in Rwanda (RCW-7, RCW-9, RCW-11, RCW-12 and RCW-13) co-signed a letter addressed to Canadian authorities asking them to intervene to improve their conditions of detention in exchange for testimony;
- Witnesses C-19, C-22, C-23 and C-24 stated that the appellant kidnapped and raped a young girl with the first name of Asumpta, who, when testifying for the defence under the pseudonym DDM-17, denied knowing or having dealt with him in any way whatsoever.

[227] It is well established that collusion undermines the probative value of concurring testimony (*R. v. Shearing*, [2002] 3 S.C.R. 33 at para. 40).

[228] Although specific evidence of collusion is not necessary (*R. v. Burnie*, 2013 ONCA 112 at para. 36), there must nevertheless be evidence that the witnesses had the opportunity to influence each other through their communication about the specific events at the basis of the charges. That is not the case here.

[229] In this case, none of the witnesses for the Crown questioned about the *Gacaca* meetings referred to any discussions about the appellant's participation in the abuses committed during the genocide. Moreover, counsel for the appellant never asked these witnesses whether their client had ever been mentioned during these meetings. In other words, the allegation of possible collusion or contamination in the context of the *Gacaca* meetings is strictly speculative and not based on sufficient evidence to require a warning.

[230] With regard to the letter from the detainees, the witnesses who were asked by the defence whether the signatories had discussed the appellant (RCW-9 and RCW-12) answered in the negative. RCW-9 explained that each witness prepared his or her own testimony individually with Crown counsel. RCW-12 stated that the witnesses did not know for which proceeding they were there, and they did not talk about the appellant amongst themselves. The subject of the letter was brought up with RCW-11, although the question regarding discussions about the appellant was not put to him. The subject was not even touched upon with RCW-7 and RCW-13. In short, while the evidence may

reveal some contact among the signatories of the letter to the Canadian authorities, it contains no indication whatsoever of collusion or contamination on the subject of the appellant's actions. Once again, the allegation is nothing more than speculation and is insufficient (*Shearing* at para. 44).

[231] The remaining question concerns the testimony given by C-19, C-22, C-23 and C-24 regarding the kidnapping and rape of DDM-17.

[232] If the trial judge had concluded that the appellant raped DDM-17 even though she denied it, we would have to agree with the appellant that he should have explained why he believed C-19, C-22, C-23 and C-24 instead of DDM-17, and why he was ruling out the possibility of collusion.

[233] The judge did not rely on this incident, however, and does not discuss it in the portion of his decision dealing with his findings of fact relating to the offences committed by the appellant (paras. 1941 et seq.).

[234] Therefore, if there was collusion, onwhich the Court takes no position, its effect was merely collateral, in that it had the potential to undermine only the general credibility of C-19, C-22, C-23 and C-24. The testimony of these witnesses on the appellant's presence at the prefectural office and his role in the abuses committed there was not the only evidence presented on these subjects. Their testimony was supported by those given by C-15, C-16, C-17 and C-20, against whom no allegation of collusion has been made. In other words, the testimony of C-19, C-22, C-23 and C-24 on the actions committed by the appellant, excluding the incident involving DDM-17, could reasonably be accepted by the trial judge.

[235] In summary, none of the grounds of a general nature has any merit.

* * * * *

[236] The Court will now move on to the complaints relating to the judge's individualized assessment of the sixty-six witnesses he heard.

[237] The Crown sought to characterize the appellant's actions in relation to four specific clusters of activity: at the Ngoma church, at the prefectural office in Butare, at the roadblocks erected in this city, and in various other locations.

[238] It also sought to demonstrate that the appellant played a key role as leader of a group of the *Interahamwe*, the extremist Hutu militia. It should be pointed out, however, that the appellant was not charged under subsection 7(2) of the *Act* regarding the criminal liability of "superiors" other than military commanders.

(A) The church in Ngoma

[239] RCW-2, RCW-11 and RCW-13 testified that hundreds of Tutsis took refuge in a Catholic church in Ngoma and that, on April 30, 1994, they were killed. The existence of this massacre has not been contested.

[240] What remained to be established was whether the appellant participated in this event, and if so, the nature of his participation.

[241] The judge accepted the testimony of RCW-11 that he was forced to follow a group of the *Interahamwe* to the Ngoma church, that the appellant was acting as one of the leaders of this group, that he ordered the refugees to come out of the church, and that, once outside, the Tutsi refugees were led to a mass grave a short distance away to be executed. From where he was posted, RCW-11 did not see the murders, but he heard the cries of the victims.

[242] As for RCW-13, the judge believed him when he stated that the appellant and his group came to get him at the roadblock where he was working so that he could go to the church with them, that the appellant ordered him to open the doors to the building, and that he saw him execute a Tutsi youth who was trying to run away. The others were executed a short distance away in a small wooded area or on the adjacent soccer field. They were shot or clubbed to death. He states that the appellant killed survivors with a handgun.

[243] The judge found that these two witnesses corroborated each other, which the appellant contests, raising primarily the following arguments:

- A contradiction between the two witnesses for the Crown as to whether shots were fired; RCW-11 states that he did not hear any gunfire or see the appellant kill any Tutsis who had sought refuge in the church, while RCW-13 states that the appellant murdered the Tutsis with a handgun. For the defence, DDM-40 also stated never having heard any gunfire;
- A second contradiction concerning the priest at the church (bound or free to move around);
- A third contradiction regarding the exit from the church by the Tutsis who had taken refuge there (by the large red door or the small black doors.
- A fourth contradiction regarding the presence of the appellant at the scene after the church doors opened; RCW-2, who knows the appellant, stated that he did not see him at the scene, and this is also what DDM-32 stated.

[244] Aside from these specific contradictions, the appellant argues more generally that RCW-11 and RCW-13 lack credibility. He invokes the failure to mention his participation to the Rwandan authorities, the risk of contamination and collusion resulting from their participation in the *Gacaca* meetings, and their signing, along with other detainees (RCW-7, RCW-9 and RCW-12), of the letters to Canadian authorities about their conditions of detention.

[245] He concludes that the evidence was insufficient to convict him of the murders committed at the Ngoma church and that the verdict in this respect was unreasonable.

Analysis

[246] The issue of contamination and collusion has already been addressed. It is worth adding, however, that it is quite strange that the appellant argues on the one hand contamination and collusion, while maintaining on the other that the versions given by

RCW-11 and RCW-13 are so contradictory that the judge's conclusion about his participation in this event is unreasonable. If these witnesses had actually agreed on the content of their testimony, it seems more likely that their versions would have been similar.

[247] In the Court's opinion, despite certain discrepancies between the testimony of RCW-11 and that of RCW-13, the judge's conclusion as to the appellant's participation in the Ngoma church massacre is reasonable.

[248] First, as the respondent points out in its submissions, the atmosphere that prevailed during the massacre was chaotic to say the least, and hundreds of people (soldiers, *Interahamwe*, Tutsi refugees, onlookers) were involved, inside the church and within a relatively large perimeter outside it (as the series of photographs filed as exhibit RCE-1 attests). In this context, it seems normal that the witnesses neither saw nor heard everything that occurred and that their versions may differ with respect to some of the details.

[249] As for the gunfire, the evidence is neither determinative nor conclusive as to whether the appellant was at the church and whether he participated in the attack.

[250] Admittedly, RCW-11 testified that he did not hear any gunfire at the church itself, but he also said that shots could be heard anywhere that a massacre was taking place during that period. He also stated that some of the assailants were carrying guns.

[251] In RCW-13's version, there was gunfire. He stated that the refugees were shot to death, or more specifically that the appellant killed them with a handgun. He did not specify the number of shots or the number of victims killed in this way, however.

[252] For his part, RCW-2 heard at least one gunshot. DDM-32 heard soldiers shooting before the church doors opened, and DDM-40, hidden in the rectory, heard nothing.

[253] All of these witnesses, however, recounted the same event. This is not in question. In the circumstances, ascertaining whether guns were fired in no way helps in determining whether the appellant was present and participated in the massacre. At most, the discrepancies in the testimonies on this subject demonstrate that, ten years later, the memory of some of the victims failed when it came to certain details of the attack.

[254] In *Prosecutor v. Naletilic and Matinovic* (31 March 2003) Case No. IT-98-34-T (ICTY, Trial Chamber), the Tribunal wrote:

> 10. In evaluating the evidence given by witnesses, the Chamber has taken into account that the alleged events took place almost ten years before the witnesses presented their testimonies in court. The Chamber accepts that due to the long period elapsed between the alleged commission of the crimes and the trial, witnesses cannot reasonably be expected to recall the precise minutiae, such as exact dates or times, of events. The Chamber further notes that many Prosecution witnesses were transferred through a number of different detention facilities, in a sequence that may, for some, have amounted to traumatic experiences. The Chamber finds that such witnesses cannot be expected to recall each and every detail regarding the sequence or details of the events. The

> Chamber further shares the view of Trial Chamber II that in most instances the oral evidence of a witness will not be identical with the evidence given in a prior statement. It lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews and that he may remember additional details when specifically asked in court. Consequently, the Chamber has not attached particular significance to minor inconsistencies in the testimony of a witness or irrelevant discrepancies in peripheral matters in the testimonies of different witnesses who testified to the same events. The Chamber has, however, only attached probative weight to evidence submitted by witnesses who were, as a minimum, able to recount the essence of the incident charged in sufficient detail.

[255] More recently, in *Prosecutor v. Nyiramasuhuko et al.* (24 June 2011) Case No. ICTR-98-42-T (ICTR Trial Chamber), a trial involving, among others, the appellant's friend Shalom and his mother, Minister Pauline, the Trial Chamber made similar remarks:

> 178. Moreover, the Chamber has discretion to determine whether alleged inconsistencies between prior statements and later testimony render the testimony unreliable, and the Chamber may accept parts of a witness' testimony while rejecting other parts. Where testimony lacks precision or is inconsistent about matters such as the exact date, time or sequence of events, the lack of precision does not necessarily discredit the evidence provided that the discrepancies relate to matters peripheral to the charges in the indictments. For example, some inconsistencies in testimony may be caused by cultural factors and interpretation issues. Similarly, it may be difficult to recall particular dates with respect to events that are repetitive or continuous.
>
> 179. Many witnesses lived through particularly traumatic events and the Chamber recognises that the emotional and psychological reactions that may be provoked by reliving those events may have impaired the ability of some witnesses to clearly and coherently articulate their stories. Moreover, where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision.

[256] As in the case of the gunfire, the issue of whether the priest, Eulade, was bound when the church doors opened or at any other time during the attack is a peripheral detail that is of little value in determining whether the appellant was at the scene. It is worth noting, however, that RCW-11, RCW-13 and DDM-32 all confirm that the priest was present at one point or another as the attack began.

[257] Which door the refugees used to exit the church is also a peripheral detail. Moreover, the [TRANSLATION] "contradictions" alleged by the appellant are in fact not really contradictions at all and can be explained by the fact that the witnesses were posted at different locations. It is also worth noting that RCW-13 testified that the church was surrounded and that he received the order to open all of the doors.

[258] According to the appellant, the fact remains that the versions given by RCW-11 (the appellant left the scene after the doors were opened), RCW-13 (the appellant was

present throughout the attack and personally took part in the killings), and DDM-12 (the appellant was not on the scene) are irreconcilable.[7]

[259] This submission must be rejected.

[260] First, as the Crown argues, the appellant has failed to consider that these witnesses were not all at the same place during the attack. For example, while it is true that RCW-11 stated that he saw the appellant leave the area after the doors were opened, he nevertheless received a subsequent order to station himself near the wooded area, at a spot where he could not see the refugees being killed. Thus, RCW-11 saw the appellant moving away from the doors, but he did not see him leave the large churchyard.

[261] In addition, RCW-11's version is not inconsistent with that of RCW-13 because the latter testified that he saw the appellant when the doors opened and then later where the refugees were executed, a location that RCW-11 could not see from where he was posted.

[262] Finally, DDM-32, whose testimony the judge deemed to be less than credible, stated that he arrived after the doors opened and therefore, according to RCW-11's version, after the appellant had left the front of the church. He then spent most of his time inside the church, from where he could not see the spot where the refugees were killed, and he left before the end of the massacre. He said, however, that he saw RCW-13 lead the refugees lower down to where they were killed. This is consistent with RCW-13's statement that he saw the appellant at this location.

[263] In short, although there may at first glance appear to be discrepancies between some of the facts related by the various witnesses, such is not really the case.

[264] In the circumstances, the Court has no reason to interfere with the judge's findings of fact regarding the appellant's participation in the massacre of the Tutsis who had taken refuge in the Ngoma church.

(B) The prefectural office

[265] The evidence establishes that many people, mostly Tutsis, believing they could find protection there, took refuge in the prefectural office in the centre of the city of Butare, which is where murders, rapes and other abuses were committed.

(i) *Murder of Tutsis*

[266] C-17 stated that she saw the appellant kill two men with a machete while he was forcing Tutsis into a small truck with Shalom and other members of the *Interahamwe*. Those who resisted were beaten or killed.

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[7] Contrary to what the appellant submits, the testimony of RCW-2 and that of DDM-40 are of very little use in answering this question, since both witnesses have admitted that they remained hidden during the attack and that they could not see everything.

[267] C-19 affirmed that she saw the appellant kill two men near the prefectural office solely because they were Tutsis.

[268] C-20 stated that she witnessed two incidents. One involved the murder of children, whom the appellant and the members of his group put into bags and beat to death with sticks. The appellant supposedly said that if you wanted to kill a snake, you had to hit it on the head. The other involved an attack on a family that was arriving at the prefectural office. The appellant and his group allegedly beat the two men in the family to death.

[269] The appellant argues that the identification evidence given by C-17, C-19 and C-20 was weak. In the case of C-17, he alleges that she learned his identity through others and was unable to identify him in a photo lineup. Her only positive identification of him took place at the trial, and is therefore not reliable. This was also the case with C-19. As for C-20, she was not even able to positively identify the appellant at trial even though he was sitting in the prisoner's dock.

[270] The appellant adds that the trial judge ignored the fact that C-17 had taken part in the *Gacaca* meetings and failed to compare C-17's testimony with what was said before the ICTR, where she stated that she knew only Shalom and not the other *Interahamwe* fighters who were besieging the prefectural office. She never mentioned the appellant's name before the ICTR, even though she affirmed at trial that he sexually assaulted her four times.

[271] As for C-19, it appears that she told the ICTR that she saw Shalom only once during the genocide, whereas she told the trial judge that he was always with the appellant. She also told the RCMP investigators that Shalom and some members of the *Interahamwe* that she did not know were responsible for the killings, and then connected the appellant with the murders of several Tutsis. The appellant also argues that there is probable collusion with witnesses C-22, C-23, and C-24.

[272] The appellant submits that, in a statement to the RCMP investigators, C-20 said that the appellant did not oversee the incident involving the murder of the children in bags and that in fact he committed no murder. The judge should not have ignored the accuracy of the statements made to the police officers, since they were the subject of an admission.

Analysis

[273] The complaints concerning identification, contamination and collusion were discussed above.

[274] With regard to the identification evidence, it is sufficient to add that, after some hesitation, C-20 positively identified the appellant in the photo lineup. C-19 was less categorical: she identified the correct photograph in the lineup, saying only that it resembled the appellant. Admittedly, C-17 was not able to identify the appellant in a photo. Like the other two witnesses, however, she said that the appellant had a very large scar on his face (C-19 and C-20 called him "*Gikovu*" for this reason). In our view,

this evidence allowed the judge to find that the identification evidence was sufficient and objectively reliable.

[275] As for the rest, it essentially concerns the assessment of the credibility of the witnesses, a task, it should be recalled, that lies at the heart of the trial judge's role.

[276] With respect to C-17's failure to mention the appellant's name to the ICTR investigators and in her testimony before that tribunal, this fact was duly noted by the judge. He accepted her explanation that her memory of the appellant returned to her gradually. While it may initially appear astonishing that the victim, who testified that the appellant raped her four times, had trouble remembering him, it is important to recall she claims to have also been raped numerous times by members of the *Interahamwe*. She also explained that the questions before the ICTR concerned primarily Shalom and not the appellant and that she therefore did not mention his name.

[277] As the respondent points out, the *ad hoc* tribunals have recognized that some witnesses merely answer the questions put to them and recount only the actions committed by the people they are asked about. Thus, in *Prosecutor v. Karemera et al.*, (15 December 2006) Case No. ICTR-98-44-T, Decision on defence motions to prohibit witness proofing (ICTR, Trial Chamber) at para. 11, the ICTR Trial Chamber cites with approval the following passage from the decision of the same Chamber in *Bagosora et al*. (18 November 2033) Case No. ICTR-98-41-T, Decision on admissibility of witness DBQ (ICTR, Trial Chamber) at para. 29:

> … witness statements from witnesses who saw and experienced events over many months which may be of interest to this Tribunal, may not be complete. Some witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused rather than volunteering all the information of which they are aware.

[278] A certain amount of prudence is therefore required when considering statements made by a witness in proceedings other than those involving the accused, especially when the accused was never mentioned.

[279] C-19 also explained that she did not refer to the murders committed by the appellant at the prefectural office when she testified in Arusha because she was not asked any questions about him.

[280] C-20 explained that her statement to the RCMP investigators was confused because she was not feeling well that day and was pressed for time (she was on her way to vote). She also stated that she was unnerved by her first interaction with the legal system, adding that it was impossible in a single meeting to describe everything she had experienced during the genocide.

[281] The judge, who had the advantage of hearing and observing the witnesses, could properly consider these explanations valid. A different judge might have arrived at a different conclusion,[8] but that is not the point. There is nothing to justify finding that the

[8] See for example *R. v. Mungwarere* at para. 1250.

judge's conclusions regarding the murders committed at the prefectural office by the appellant were not sufficiently based on the evidence and were therefore unreasonable.

(ii) Sexual assault

[282] C-17 stated that she was raped by the appellant four times. He would come to get her at the prefectural office during the night, carrying a knife or an axe, take her inside old neighbouring buildings, and sexually assault her. She stated that she also saw the appellant assault other women at the same location, two of whom were named Immaculée and Alphonsine.

[283] Other women who were not personally assaulted by the appellant stated that he had participated in the rapes of numerous Tutsi women: C-15, C-16, C-19, C-20, C-23 and C-24.

[284] C-15 stated that she and two other women (Alphonsine and Caritas) were taken by the appellant and other *Interahamwe* members to Mahenga's, located near Chez Venant, and were sexually assaulted there. The appellant allegedly raped Alphonsine and other women. The witness referred to [TRANSLATION] "sexual captivity", characterized by rapes, often repeated, which were committed at the prefectural office by the appellant and members of the *Interahamwe*. She stated that when ten or so men were raping her, they said that they wanted to see if Tutsis were better than the others.

[285] C-16 saw the appellant and his group bring three girls into an abandoned building (Mironko Plastiques). The appellant left with Alphonsine. He came back several times to get girls to bring to Mahenga's. According to her, he was choosing and distributing girls to the *Interahamwe* members. C-16 witnessed girls being raped and was herself raped by a member of the *Interahamwe* and a policeman when she had taken refuge at the prefectural office. She stated that almost all of the women who had taken refuge there suffered the same fate.

[286] C-17, who was raped by members of the *Interahamwe*, affirmed that the appellant raped her several times, as well as other women. Members of the *Interahamwe* raped women from the prefectural office at random, but eventually all of them were raped. She stated that the appellant told her that he was going to do whatever he wanted with her because she was going to be killed. She added that it was not usual to speak about the rapes in the prefectural office, since all of the women were victims.

[287] C-19 also testified that, after nightfall, the appellant and his group would come to the prefectural office to get the girls and rape them, either on the spot or in old neighbouring houses. She states that she saw him assault a girl by the name of Fifi in front of several witnesses. He also assaulted Alphonsine, as well as two other girls by the names of Asumpta (witness DDM-17) and Émérance. She adds that she was raped by members of the *Interahamwe*.

[288] C-20's testimony was to the same effect. She stated that the appellant was the leader of the group who would take girls away from the prefectural office after nightfall and sexually assault them. The appellant's group acted in this manner because its members believed they had the right to be rewarded after the work they had done.

[289] C-23 gave a similar testimony, stating that the appellant allegedly declared that the girl named Asumpta (DDM-17) was his property. The assaults took place in old houses near the prefectural office or in Mahenga's house.

[290] Finally, C-24 also stated that the appellant was part of the group of rapists at the prefectural office and that he regularly left with Asumpta (DDM-17). She allegedly heard the appellant say to a member of the *Interahamwe*, [TRANSLATION] "Rape the Tutsis and kill them".

[291] C-22, C-23, and C-24 state that the *Interahamwe* took the women and girls from the prefectural office to rape them on the spot or a short distance way. Sometimes they were held captive for several days. The appellant also acted in this manner.

[292] The appellant argues that C-17 was not able to identify him in a lineup. He also impugns her credibility on the grounds that she took part in *Gacaca* meetings and especially because she never mentioned his name during her testimony before the ICTR, which lasted about ten days. On the contrary, she stated that, other than Shalom, she did not know any of the *Interahamwe* who were terrorizing the prefectural office. He adds that it is strange that a witness who claims to have been raped several times by the appellant failed to mention this fact prior to his trial and that she could not identify him in a photograph.

[293] The appellant's criticisms of the other witnesses concern essentially gaps in the identification evidence and their lack of credibility. He argues that:

- C-15 lied to the judge to justify or explain her perjury before the ICTR. Moreover, her version of the facts is replete with contradictions and based on hearsay. She never spoke about the appellant before meeting with the Canadian authorities and she was unable to describe him. She was not able to recognize the Hotel Mahenga where she was allegedly taken and assaulted.
- C-16 gave four different versions regarding Shalom's presence in the prefecture. The contradictions in these versions were significant in that Shalom was the appellant's inseparable acolyte. Moreover, her testimony about the rapes was based on hearsay. She was not able to identify the appellant in a photo lineup and learned his name from other people.
- C-19 was not able to identify the appellant in a photo lineup and she never mentioned his name when she testified before the ICTR. Before the ICTR, she stated that she saw Shalom only once during the genocide, although before the judge she stated that he was always with the appellant. She also told the RCMP officers that Shalom and

some *Interahamwe* members that she did not know were responsible for the killings, and then connected the appellant with the murders of several Tutsis. The appellant also raises a risk of collusion among witnesses C-22, C-23, and C-24 regarding the alleged rape of DDM-17. Her testimony about the rapes is based on hearsay.

- C-20 was not able to identify the appellant in a photo lineup and, moreover, she did not positively identify him in the prisoner's dock. Her testimony contains numerous contradictions and, in a statement she gave to Canadian police officers, she was not able to affirm that the appellant kidnapped girls from the prefectural office to rape them.
- In a statement given to Canadian police officers, C-22 stated that she did not know the name of the *Interahamwe* members who were kidnapping girls from the prefectural office and that she did not witness any such kidnappings by the appellant.
- C-23 did not positively identify the appellant during her meeting with the Canadian police. She took her time before implicating the appellant, whose name she never mentioned during her testimony before the ICTR. There was allegedly collusion amongst witnesses C-19, C-22, and C-24 regarding the rape of DDM-17.
- C-24 did not positively identify the appellant in a photo lineup. When asked to describe the appellant to Canadian police in 2003 and 2005, she never mentioned a scar. She learned his name from other people. Her testimony contained contradictions and she conspired with C-19, C-22 and C-23 regarding the rape of DDM-17.

[294] For all of these reasons, the appellant argues, it is unreasonable to rely on their testimony and find that he participated in the rapes that took place in the prefectural office and its surrounding area.

Analysis

[295] There is no dispute that the prefectural office was the site of numerous incidents of sexual abuse and, in particular, that soldiers and *Interahamwe* militia went there regularly to kidnap women in order to rape them. This observation is based on evidence adduced by both the Crown and the defence (testimony of DDM-17).

[296] The judge's task, therefore, was solely to determine whether the evidence demonstrated beyond any reasonable doubt that the appellant had participated in these rapes in one way or another, either by committing some of them himself or by being and accomplice.

[297] Except for the testimony of C-17, who states that she was personally raped by the appellant on a few occasions, the Crown's evidence seeks to establish that the appellant took part in the rapes by choosing women and distributing them to the militia men and by raping some himself.

[298] According to the appellant's arguments, all of the witnesses from the prefectural office have no credibility whatsoever and their testimony as to his participation in the abuses that were committed there, and more particularly the rapes of the refugees, were pure fabrication. With respect, this conspiracy theory is difficult to accept. While it is true that the witnesses' testimony at the prefectural office are not perfect and disclose certain weaknesses, there is nothing to justify rejecting them wholesale, as the appellant proposes.

[299] The issue of the sufficiency of the identification evidence has already been addressed and treated, as have those concerning the effect of the allegations of collusion amongst witnesses C-19, C-22, C-23, and C-24 and the contamination resulting from the participation of some of the witnesses in *Gacaca* meetings.

[300] As for the rest, the sole issue is the assessment of the credibility of the witnesses. The appellant insists above all on the fact that several witnesses failed to implicate him immediately, whether to the ICTR investigators, to the RCMP officers, or during their testimony before the ICTR.

[301] What the appellant is asking the Court to do illustrates the delicacy of the task before appellate judges in such matters, since that they have not had the advantage of seeing or hearing the witnesses. On numerous occasions, the Supreme Court of Canada has noted that while an appellate court has the power to reject a verdict because it is unreasonable, this ground must not become an excuse to ignore the findings of fact of the judge or jury, as the case may be, with respect to credibility. In *R. v. W.H.*, the Supreme Court states:

> 33 *R. v. Burke*, [1996] 1 S.C.R. 474, and *R. v. R.P.,* 2012 SCC 22, [2012] 1 S.C.R. 746, while judge-alone cases, further underline the great deference which must be shown by the appellate court to the trial court's assessment of credibility. In the latter case, Deschamps J., for the majority, reiterated the applicable principle as follows:
>
> > Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7). [Emphasis added; para. 10.] 10.
>
> 34 Perhaps the most useful articulations of the test for present purposes are those found in *Biniaris* and *Burke*. In the former case, Arbour J. put it this way: "… the unreasonableness …. of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). In the latter, Sopinka J. concluded that a verdict based on credibility assessment is unreasonable if "the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence": para. 7 (emphasis added). While appellate review for unreasonableness of guilty verdicts is a powerful safeguard against wrongful convictions, it is also one that must be

> exercised with great deference to the fact-finding role of the jury. Trial by jury must not become trial by appellate court on the written record.

[302] In this case, the judge duly noted and considered the main contradictions and the fact that some of the witnesses were slow to implicate the appellant (especially in his reasons in the confidential schedule, which is more detailed than the public judgment). In particular, as a general rule, he outlined the witnesses' explanations and his reasons for accepting them. Since the Court is not in a position to assess the sincerity of the explanations and justifications given by the witnesses because it did not see or hear them, the judge's conclusions in this respect warrant deference.

[303] In short, while some of the elements of the testimony, considered separately, may appear questionable or create a vague sense of unease, it is important to consider all of the evidence as a whole when determining whether the verdict is unreasonable. Unless all of the witnesses' testimony of the witnesses from the prefecture can be rejected as a whole, it must be found that the judge had sufficient evidence to conclude beyond any reasonable doubt that the appellant went to the prefecture on several occasions and took part in the rapes of many of the women who had taken refuge there.

(C) The roadblocks

[304] Many of the witnesses established that, as of the second half of April of 1994, roadblocks were erected at various locations throughout the prefecture of Butare with the aim of preventing the passage of Tutsis by driving them back, stopping them and taking them somewhere else, or killing them.

(i) *The presence of the appellant at the roadblocks*

[305] Several of the witnesses testified about the appellant's presence at the roadblocks and hise role there:

- RCW-7: the appellant drove from one roadblock to another and spoke with the guards;
- RCW-8: the Tutsis captured at the roadblocks were handed over to the people in charge, who included the appellant and Shalom;
- RCW-9: the appellant and Shalom were in charge of the roadblocks near the university. The appellant gave the order to stop anyone crossing the roadblocks without an identity card;
- RCW-10: the appellant and Shalom were in charge of the roadblock near the home of Minister Pauline;
- RCW-12, the appellant drove from one roadblock to another, checking the status of the situation at each one;
- RCW-14: the roadblocks were run by gun-carrying individuals, one of whom was the appellant;
- C-15: the appellant was in charge of the roadblock near Chez Venant;
- C-20: the appellant spent time at the roadblock near Chez Venant;

[306] In addition to the criticisms regarding the credibility of these witnesses, the weakness of the identification evidence given by some of them, and the need for the judge to warn himself with regard to some of the testimony, the appellant submits that:

- Contrary to what was affirmed by the trial judge, RCW-7 testified that she never saw or heard the appellant give orders to the guards at the roadblocks;
- RCW-10 said that the appellant was in charge of the roadblock erected near the home of Minister Pauline, while DDM-12, who was working there, said that he was not one of the guards; DDM-45 also testified that the appellant was not in charge of this roadblock;
- RCW-12 never set foot in the city of Butare during the genocide and therefore his testimony concerned only the roadblock set up near his home in Matyazo, a commune north of Ngoma; the judge therefore erred by accepting his testimony that the appellant was in charge of the roadblocks in the city of Butare. Moreover, his testimony as to the appellant's presence in Matyazo was contradicted by RCW-10 and DDM-38.

Analysis

[307] As the respondent argues, the Crown did not try to establish that the appellant was in charge of one roadblock in particular, but rather that he would drive from one roadblock to another to give orders or instructions. This evidence tended to demonstrate not the commission of a specific underlying offence but, through the role he played as an *Interahamwe* leader in the prefecture of Butare, his knowledge of the situation.

[308] It is indeed true that RCW-7 said that he never personally received orders from the appellant and that he never saw him actually kill anyone. He did, however, testify that the appellant and Shalom patrolled from one roadblock to another and that they recruited guards. The witness frequently saw the appellant in the company of "killers", wearing military clothing and carrying a rifle.

[309] RCW-10 testified that he saw the appellant at the roadblock near the home of Minister Pauline. But he never stated that he was [TRANSLATION] "in charge of" the roadblock or that he was there permanently. On the contrary, his testimony is consistent with the Crown's submission that the appellant and Shalom would drive from one roadblock to another, as the witness also told the RCMP.

[310] RCW-12 stated that, at the roadblock where he worked, the appellant behaved like an *Interahamwe* leader (he drove around in a vehicle, spoke to the guards to find out whether they had performed their work properly, wore military clothing, and carried a Kalashnikov).

[311] The testimony of RCW-8, RCW-9, RCW-14, C-15 and C-16 also support the Crown's theory as to the appellant's role at the various roadblocks. He was seen at several of them and is consistently described as a person of importance, a leader, by

witnesses who in most cases did not see each other during the genocide and who have no connection with each other.

[312] In this context, the contradictions the appellant raises – often minor, secondary, and concerned with details – are not sufficient to set aside the judge's conclusion that the appellant was one of the leaders of the *Interahamwe* in Butare.

(ii) The murders committed at the roadblock near Chez Venant

[313] The trial judge concluded that the appellant had participated in the murders of four Tutsi individuals at the roadblock near Chez Venant, which was very near the prefectural office, on the basis of the testimony given by C-15, C-16, and C-19.

[314] According to C-15, the appellant was one of the leaders, and she saw him murder a young man by beating him with a stick when she was just a few metres away.

[315] C-16 testified that she saw the appellant and other members of the *Interahamwe* bring four Tutsis near Chez Venant, hang them by their feet, and beat them to death. The appellant, who was carrying a gun, allegedly said that all Tutsis must die.

[316] As for C-19, from her vantage point at the prefectural office, she saw the appellant and two of his associates beat a young Tutsi named Sebukaawire to death.

[317] First, the appellant challenges the identification evidence of the witnesses:

- C-15 did not clearly identify the appellant in a lineup in 2005, saying only that he looked like the individual in photograph number 8. She was also unable to describe the appellant to the RCMP officers.
- C-16 did not know the appellant before 1994 and she learned his name from other people. She was unable to identify him in the photo lineup organized by the RCMP officers, although she was able to do so in the photo lineup presented to her at trial because the appellant was present. This identification therefore is of no value;
- C-19 was not able to identify the appellant in the photo lineup. She was able to do so only at trial, which is of no value.

[318] He also impugns their credibility for the reasons already stated in the section on the rapes that took place at the prefectural office.

Analysis

[319] The criticisms of witnesses C-15, C-16 and C-19 have already been discussed, and the Court has found that there was no reason to set aside the judge's findings as to their credibility. Consequently, the judge's conclusions regarding the murders committed near the roadblocks at Chez Venant are not unreasonable.

(iii) The murders committed at the university laboratory

[320] The judge relied on the testimony of RCW-10 and RCW-14 to conclude that the appellant directly participated in the murder of Tutsis behind or very near the university laboratory.

[321] RCW-10 stated that the appellant, who was at the roadblock near the home of Minister Pauline, forced about forty Tutsis into three small trucks and carried them behind the university laboratory. There they were forced to undress and then executed by the appellant, Shalom, and another member of the *Interahamwe*. The appellant used a knife.

[322] RCW-14 testified that there was a grave behind the laboratory. He witnessed the appellant along with Shalom and another member of the *Interahamwe* bring six Tutsis there to be executed. On another occasion he saw the appellant bring Tutsis there but he did not witness their execution. He did hear the gunfire, however.

[323] The appellant faults the judge for failing to consider that, in 2000, when RCW-10 was questioned by the RCMP, he stated that he never saw the appellant kill anyone at all. Although he stated the contrary in interviews in 2003 and 2004, these statements were not used by the defence and could not be used in reexamination by the Crown, as they in fact were. Citing *R. v. Ellard*, 2009 SCC 27, [2009] 2 S.C.R. 19, the appellant submits that the judge could not allow the Crown to enhance the credibility of the witness by adducing subsequent statements in reexamination. He argues that the judge should not have assigned any credibility to this witness because of his participation in the murder of Tutsis, his collusion with other detained witnesses, his participation in the *Gacaca* meetings, and contradictions with his own statements and those of other witnesses.

[324] Regarding RCW-14, the appellant points out that the witness was unable to identify him in photo lineups in 2003 and in March of 2005, but the judge relied only on a later identification at the rogatory commission. Moreover, during his testimony, RCW-14 contradicted a prior statement in which he had stated that he did not see the appellant kill anyone whatsoever. Finally, he was a detained witness who was convicted for his participation in the genocide, who participated in the *Gacaca* meetings, and who was tardy in implicating the appellant. As a result of all of these factors, he is not credible.

Analysis

[325] Upon reading the Crown's reexamination of RCW-10, it is clear that the objective was solely to enhance the witness's credibility following his cross-examination by presenting other statements made to the RCMP. Aside from a few exceptions not applicable here, such evidence is inadmissible and should not have been considered by the judge for the purposes of assessing the credibility of RCW-10 (*Ellard*, at paras. 31 and 32).

[326] As the following excerpt from his judgment shows, the judge took these statements into consideration:

> [TRANSLATION]
>
> [563] Comments: He testified at length, with precision and rigour. He remained credible despite contradictions between his testimony in court and some of his written statements. Other written statements were consistent with his testimony.

(see also para. 216 of the Confidential Schedule).

[327] The Court does not find that this was a mere technical error with no negative consequences for the appellant. Rather, it concludes that this was a serious error of law (see *R. v. D.D.S.*, 2006 NSCA 34 at para. 84).

[328] In the circumstances, the Court must take no account of the testimony of RCW-10 as it concerns the incident of the murders behind the university laboratory.

[329] The fact remains, however, that witness RCW-14 testified as to the appellant's participation in the murders of Tutsis near the university laboratory.

[330] Despite his failure to identify the appellant during the photo lineup in 2005, RCW-14 positively identified the appellant without any hesitation when the lineup was presented to him again during the rogatory commission, when the appellant was not present. At the time, he also testified that there was a very visible scar on the appellant's face.

[331] In short, although there admittedly are discrepancies between the RCW-14's testimony before the judge and some of the statements he made to the RCMP officers, the fact remains that each of his accounts attested to the presence and active participation of the appellant in the murder of Tutsis behind the laboratory, albeit to varying degrees. In one version, the appellant was giving orders, while in the other, he shot at some of the refugees. To determine his guilt, however, it matters little whether the appellant committed the underlying offence of ordering the murders or whether he pulled the trigger himself.

[332] For these reasons, the Court finds that the conclusions of the judge as to the appellant's participation in the murder of the Tutsis behind the university laboratory should not be set aside.

(D) The other incidents

[333] The Crown's witnesses also reported other murders, rapes and pillage committed by the appellant in various other locations within the commune.

(i) Murder of a girl in the yard behind the merchant Felici's home

[334] According to RCW-11, the appellant killed a girl in the courtyard behind the house belonging to Felici, a rich Tutsi from the Ngoma commune, while the house was being pillaged.

[335] The appellant submits that RCW-11 was contradicted by DDM-32, a witness for the defence, regarding his presence at the scene. Moreover, RCW-11 is not corroborated by any other witness. The appellant argues that, considering his poor credibility, his participation in *Gacaca* meetings, and the fact that he signed the letter to the Canadian authorities, there is no reliable evidence of his participation in the murder of a young girl at Felici's residence.

Analysis

[336] Setting aside the judge's conclusion on this incident because he failed to explicitly discuss the contradiction between RCW-11 and DDM-32 would be unjustified. In fact, because the judge stated that he assigned no credibility to DDM-32, who also

tended to minimize his own participation in the attacks against the Tutsis, it follows that the apparent contradiction no longer exists.

[337] As for the other grounds raised, they have already been rejected.

(ii) The repeated rape of his Tutsi cousin

[338] C-21, a Tutsi, is the appellant's cousin. During the genocide, she took refuge at the home of the appellant's father to hide. She states that she was assaulted by the appellant on five occasions in the room of an annex of the residence where she was hiding out.

[339] In addition to his arguments relating to the [TRANSLATION] "private" or [TRANSLATION] "personal" nature of the assaults committed against C-21, which do not merit our attention, the appellant impugns the credibility of this witness. He argues that she did not report the assaults until 2005 and that she wrote a letter in 2001 to Immigration Canada in support of the appellant. Moreover, her version of the facts is contradicted by witnesses for the defence, and particularly by DDM-18, who was staying in the same room as C-21 and states that she never saw the appellant, never heard C-21's cries, and never observed the injuries that C-21 claims she suffered.

Analysis

[340] The appellant is mistaken when he states that DDM-18's testimony should have raised a doubt in the mind of the judge because he deemed her to be generally [TRANSLATION] "credible". Although the judge did indeed say this, care must be taken not to isolate this comment from the rest of his reasons. Indeed, he also stated that DDM-18 [TRANSLATION] "was not credible when she said she did not discuss her testimony with her family, particularly her mother or Delphine, who had already testified".

[341] The judge also said that Delphine, the appellant's sister, had no credibility concerning C-21 and the family discussions, because she obviously wanted to help her brother. He came to the same conclusion with regard to the appellant's mother ([TRANSLATION] "Certain of her son's innocence, she would do anything to help him") and added that her answers often seemed prepared to counter the Crown's evidence.

[342] More generally, the judge considered the testimony of the family of the accused to have little credibility:

> [TRANSLATION]
>
> [1935] Although they denied it, the witnesses from the accused's family prepared their testimony together in order to help him. That might be a natural reaction, but by repeatedly denying the obvious, one loses much credibility.

[343] Moreover, on the basis of C-21's testimony, the judge found that some members of the appellant's family had asked her to say nothing to Canadian police officers. DDM-18 allegedly contacted her so that the people living at the appellant's father's house could meet [TRANSLATION] "to see what was said, if it's properly transcribed or if there was something we forgot or that should be added".

[344] In short, it is erroneous to state that the judge attributed total credibility to DDM-18 for everything she said and that he held two contradictory beliefs by accepting both her testimony and that of C-21. On the contrary, his reasons reveal that he did not accept the evidence of the appellant's family about the incidents involving C-21 and accepted the latter's version instead. In this respect, the appellant submits no valid argument that would justify the Court in setting aside this conclusion.

[345] C-21 also provided a plausible explanation of why she delayed before reporting the assaults (she felt guilty and was ashamed, emotions that she overcame thanks to the support of an organization helping genocide victims) and of the context of her signing of the letter recommending the appellant to Immigration Canada (after constant pressure from one of the appellant's cousins, who dictated the contents of the letter).

(iii) Pillage of the houses and businesses belonging to Tutsis

[346] The acts of pillage concern only the seventh count. The Cfrown tried to prove three distinct incidents: pillage of RCW-3's home, pillage of RCW-5's business, and pillage of the shops on the commercial street of the city of Butare.

[347] The judge was of the view that the appellant took part in the pillage of RCW-3's house in Ngoma. His conclusion was based on the testimony of RCW-3 and RCW-11.

[348] RCW-3 stated that the appellant and his group went to her house three times (in April, early May, and June). On the first two occasions, she was hiding and heard the assailants looting the home. The third time, she states that she was assaulted by the appellant, who then threw her out of her house. She also spoke of her television being stolen during this third attack.

[349] RCW-11 stated that the assailants were unable to enter RCW-3's house. He acknowledged, however, that the appellant went to RCW-3’s residence on two occasions and tried to attack her.

[350] Regarding RCW-3, the appellant faults the judge for failing to deal with the elements relating to the voice identification, pointing out that no evidence established how RCW-3, who was hidden, could have recognized the appellant's voice since, contrary to what she claimed, she did not know him. Moreover, when she referred to the third visit, she did not mention a scar on his face and, when asked whether he had any distinguishing marks, she even answered in the negative. During a photo lineup, she hesitated between two photos and said that she [TRANSLATION] “preferred" the one of the appellant. Finally, she claimed that she knew the appellant's family members well, but she was unable to name them. The family members said that they knew her. There are also numerous contradictions with her prior statements. The appellant submits that, for all of these reasons, the judge should not have accepted RCW-3's testimony, especially since there were flagrant contradictions between it and that of RCW-11.

[351] In the view of the Court, the evidence establishes that the appellant went to RCW-3's house at least twice and, because clearly the judge decided that RCW-3 was credible, that a television had been stolen.

[352] The judge found, on the basis of the testimony of RCW-5 and his employee, RCW-6, that the appellant participated in the looting of RCW-5's business.

[353] The business of RCW-5, a Butare merchant, was located near the university. He stated that the appellant, Shalom, and a group of members of the *Interahamwe* arrived carrying weapons, pillaged his store, and stole some motorbikes.

[354] RCW-6, who lived at the store and worked there seven days a week, stated that he witnessed three attacks (April 22, May 18, and July 2) by a group of members of the *Interahamwe*, including the appellant. The group allegedly pillaged the store and stole equipment (refrigerator, television, RCW-5's vehicle, motorbikes, and other property).

[355] First, the appellant argues that the identification evidence given by these two witnesses is weak. For example, RCW-5 said that he identified the appellant during the first incident by his voice, even though he had not seen him in four years. As for the visual identification, the witness allegedly saw the appellant in conditions that made it difficult to observe clearly and reliably (distance, weather, stress, fear). As for RCW-6, he was not able to positively identify the appellant in a photo lineup, saying only that one of the photographs [TRANSLATION] "resembled him". The appellant also raises contradictions between their testimony and prior statements.

[356] The respondent recognizes that there are contradictions and discrepancies between the testimony given by RCW-5 and that of RCW-6, particularly in respect of the sequence of the attacks, the acts committed during each one, and when it was that the assailants stole the motorbikes. According to the Crown, these contradictions and discrepancies may be explained by the passage of time and the difficult conditions the witnesses were in at the time of the events. Therefore, the contradictions raised by the appellant are not sufficient to set aside the conclusions of the judge, who in fact took into account the imprecision and considered the weaknesses of the testimony.

[357] The Court shares the opinion of the respondent.

[358] First, several of the alleged contradictions concern facts that are peripheral to whether the appellant participated in the attack on RCW-5's business. For example, this is the case with respect to the possible counterfeiting of RCW-5's identity card, his solvency, and what happened once he was forcibly brought outside.

[359] Second, while it is true that the sequence of the attacks as related by RCW-5 and RCW-6, who did not necessarily observe the same things from where they were at the time, do not coincide in every respect, the fact remains that they provided relatively similar details about at least one of the attacks:

- The appellant was wearing a military shirt and civilian pants;
- He was carrying a long rifle, part of which was wooden (RCW-5 added that it was a Kalashnikov);
- He opened the doors of the business by pulling on them with his gun;
- He used a red Toyota truck into which he put the property taken by the assailants;

- Motorbikes belonging to RCW-5 were taken (although the date on which this theft occurred differs between the two versions);
- There were between 15 and 20 assailants.

[360] Considering that RCW-5's business was the target of the *Interahamwe* and the soldiers on a few occasions, as well as the length of the armed conflict and its intensity, the confusion as to the dates of the various incidents related by the witnesses is understandable, especially when their traumatizing nature is considered. It should also be noted that, in cross-examination, RCW-6 ultimately admitted that he was confused and that he was having trouble with his sense of time.

[361] In short, despite a certain amount of confusion about dates and some differences in the details, it was open to the judge to accept the testimony of RCW-5 and RCW-6 in support of his conclusion that the appellant participated in the attacks on RCW-5's business, its pillage, and in the theft of the property in it.

[362] Finally, the trial judge affirmed that the appellant [TRANSLATION] "looted stores belonging to Tutsi" without providing any more detail. From his summary of the evidence, it is clear that he based this conclusion on the testimony of RCW-9, who stated that he twice saw the appellant break into shops in the business district of the city of Butare, loot them, and steal equipment that he loaded into a small white truck.

[363] According to the appellant, the procedure in which he was identified by RCW-9 was invalid, since the police had implied to him that he had a scar on his face. While RCW-9 had answered in the negative, the description of the appellant that he gave in the rogatory commission was different. Moreover, he never positively identified the appellant in a photo lineup, saying only that he [TRANSLATION] "believed" that one of the photographs was of him. The appellant adds that this witness took part in the *Gacaca* meetings, co-signed the letters from the detainees, and discussed the appellant's trial with the said detainees.

[364] The argument of lack of credibility due to participating in the *Gacaca* meetings and signing the letter from the detainees has already been addressed and rejected.

[365] As for the identification evidence, it was sufficient. In 2005, when Canadian investigators carried out a lineup, he positively identified the appellant's photograph, although with difficulty. In his testimony before the rogatory commission, he again identified the correct photograph, while explaining in cross-examination that the initial identification was difficult because of the passage of time and because he did not know when the photographs he was given had been taken.

[366] The fact that, during an interview in 2000, the Canadian police officers asked him whether the appellant had scars on his face does not affect the probative value of this evidence, since the scars are not apparent on the appellant's photograph that was used in the lineup.

[367] Therefore, there is no justification to set aside the testimony of RCW-9, which was accepted by the judge.

ARE THE VERDICTS JUSTIFIED?

[368] In this final section, the Court will discuss the reasonability of the verdicts rendered on each of the counts against the accused in light of the elements of each of the offences, the evidence accepted by the Court, and the admissions.

[369] The appellant admitted that there was a widespread and systematic attack directed against the civilian Tutsi population in Butare prefecture. He also admitted that, on April 30, 1994, the Tutsis who had taken refuge in the Ngoma church were massacred.

[370] Almost all of the Crown witnesses, who for the most part were in no way connected with each other, stated that the appellant acted as a leader during the events that took place in the Butare prefecture between April and July of 1994. That is why the judge found that he was [TRANSLATION] "at the forefront of the genocidal movement", Instead of refraining and refusing to take part in the genocide, he chose to participate actively as *Interahamwe* leader and as a member of the local elite.

[371] The judge also concluded that the appellant had distributed weapons and uniforms to the *Interahamwe*, basing this finding on the testimony of RCW-2 and RCW-8, which confirmed the important role he played.

[372] Thus, the evidence establishes that the appellant had the intent to attack Tutsis specifically and that he was at the forefront of the armed conflict in the Butare prefecture.

First count: genocide by murder

[373] To succeed, the Crown had to demonstrate beyond any reasonable doubt that, between April 1 and July 31, 1994, in the prefecture of Butare, the appellant caused or contributed substantially to deaths, and that he had the intent to cause the death of the victims or to inflict serious injury that he knew was likely to cause death and was reckless as to whether death ensued, with the intention of destroying the Tutsis.

[374] The evidence summarized in the previous section establishes each of these elements, in particular the murders at the prefectural office, at the Ngoma church, and at the roadblock near Chez Venant, and the intent to cause death because the victims were members of the Tutsi ethnic group.

Second count: genocide by serious bodily or mental harm

[375] To succeed, the Crown had to demonstrate beyond any reasonable doubt that, between April 1 and July 31, 1994, in the prefecture of Butare, the appellant committed or aided in committing serious acts such as sexual violence and rape in particular, and that he intended to commit such acts with the intent of destroying Tutsis.

[376] The evidence establishes each of these elements, in particular the rapes at the prefectural office and at his parents' home, which were committed because the victims were members of the Tutsi ethnic group.

Third count: crimes against humanity by murder

[377] To succeed, the Crown had to demonstrate beyond any reasonable doubt that, between April 1 and July 31, 1994, in the prefecture of Butare, the appellant caused or contributed substantially to deaths, and that he intended to cause the death of the victims or to inflict serious injury that he knew was likely to cause death and was reckless as to whether death ensued, as part of a widespread attack directed against the Tutsi of which the appellant had knowledge and with the awareness that his acts were part of it.

[378] The evidence establishes each of these elements, in particular the murders at the prefectural office, at the Ngoma church, and at the roadblock at Chez Venant, the intent to cause death as part of a widespread attack against the Tutsi of which he had knowledge, and that he was aware that the murders he was committing were a part of this attack.

Fourth count: crime against humanity by sexual violence

[379] To succeed, the Crown had to demonstrate beyond any reasonable doubt that, between April 1 and July 31, 1994, in the prefecture of Butare, the appellant committed sexual violence or aided in the commission thereof, as part of a widespread attack directed against the Tutsi of which the appellant had knowledge and with the awareness that his acts were part of it.

[380] The evidence establishes each of these elements, in particular the rapes at the prefectural office and his parents' home, without the consent of the victims because they were committed by force or under threat as part of a widespread attack against the Tutsis of which he was aware, and that he was aware that the acts of sexual violence he was committing were a part of this attack because he was one of its leaders.

Fifth count: war crimes by murder

[381] To succeed, the Crown had to demonstrate beyond any reasonable doubt that, between April 1 and July 31, 1994, in the prefecture of Butare, there was an armed conflict, that the appellant caused the death or contributed substantially to the death of persons who were not parties to the armed conflict, that intended to cause the death of the victims or to inflict serious injury on them that was likely to cause their death and he was reckless as to whether death ensued, and finally, that there was a nexus between the killings and the conflict.

[382] The existence of an armed conflict between the Rawndan Armed Forces and the Rawandan Patriotic Front, which took place in Rwanda, including the prefecture of Butare, has on numerous occasions been characterized as a non-international armed conflict. Its existence and its characterization are admitted by the appellant and require no further discussion.

[383] Moreover, the evidence establishes that the appellant had knowledge of the conflict, that he murdered civilian Tutsis not involved in the conflict at the prefectural office in the city of Butare, at the church, and at the roadblock near Chez Venant, his intent to cause death, and a nexus between this conflict and the murders, the latter

having been committed to eliminate civilian Tutsis believed to be members of an enemy ethnic group.

Sixth count: war crimes by sexual violence

[384] To succeed, the Crown had to demonstrate beyond any reasonable doubt that, between April 1 and July 31, 1994, in the prefecture of Butare, there was an armed conflict, that the appellant committed sexual violence or contributed substantially to its commission against persons who were not parties to the armed conflict, and, finally, that there was a nexus between the acts of sexual violence and the conflict.

[385] The evidence and the admissions establish each of these elements, in particular an armed conflict in all of Rwanda, including in the prefecture of Butare, of which the appellant had knowledge, the repeated rapes of civilian Tutsi women not involved in the conflict, at the prefectural office in the city of Butare and at his parents' home, the lack of consent but especially the use of force and threats, and a nexus between the conflict and the rapes, the rapes having been committed to crush and destroy the Tutsi civilians, to make them lose their dignity, and to wipe them out on the grounds that they belonged to an enemy group.

Seventh count: war crime by pillage

[386] To succeed, the Crown had to demonstrate beyond any reasonable doubt that, between April 1 and July 31, 1994, in the prefecture of Butare, there was an armed conflict, that the appellant committed pillage or aided in committing pillage against persons who were not parties to the armed conflict, that he intended to commit such acts, and finally, that there was a nexus between the conflict and the pillage.

[387] The evidence and the admissions establish each of these elements, in particular an armed conflict in all of Rwanda, of which the appellant had knowledge, theft of private property, of property belonging to Tutsi merchants who were not parties to the armed conflict, to wit: RCW-5's business and the stores on the commercial street of the city of Butare, led by the appellant as the head of an organized group, and a nexus between the conflict and the pillage, the pillage having been committed to allow the appellant and the members of his Hutu group to appropriate the property of Tutsi merchants. As for the acts alleged to have been committed at RCW-3’s home, the evidence does not justify concluding beyond any reasonable doubt that acts of pillage occurred there.

CONCLUSION

[388] For these reasons, the Court dismisses the appeal.

PIERRE J. DALPHOND, J.A

ALLAN R. HILTON, J.A.

FRANÇOIS DOYON, J.A.

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Date of hearing: April 22 to 25, 2013