

1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

2

3 CASE NO.: ICTR-95-1-T

THE PROSECUTOR
OF THE TRIBUNAL

4

AGAINST

5

6

CLEMENT KAYISHEMA

7

AND

8

OBED RUZINDANA

9

12 NOVEMBER 1998
0930

10

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Before: Mr. Justice William H. Sekule, President
Mr. Justice Yakov Ostrovsky
Mr. Justice Tafazzal Khan

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Courtroom Assistant:
Mr. Abraham Koshopa

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Courtroom Officer:
Mr. John Kiyeyeu

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For the Prosecution:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

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For the Defendant Kayishema:
Mr. Andre Ferran

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For the Defendant Ruzindana:
Mr. Pascal Besnier

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P R O C E E D I N G S

Kayishema and Ruzindana Trial, Continued

12 November 1998

0930

MR. PRESIDENT:

The proceedings are called to order.
Could the registrar introduce the matter coming before us this morning for the record, please.

MR. KIYEYEU:

Thank you, Mr. President. Trial Chamber 2 of the International Criminal Tribunal for Rwanda, composed of Judge William H. Sekule, presiding, Judge Yakov Ostrovsky and Judge Tafazzal Hossain Khan, is now in session today, Thursday, the 12th of November 1998, for the hearing of the continued presentation of the closing oral arguments by the defence in the matter of the Prosecutor versus Clement Kayishema and Obed Ruzindana, Case Number ICTR-95-1-T. Thank you, My Lords.

MR. PRESIDENT:

Thank you very much. Could we have counsels' appearances, starting with the

1 prosecution, for the record,
2 Mr. Rahetlah.

3 MR. RAHETLAH:

4 Good morning, Mr. President. Your
5 Honours, good morning. The prosecutor's
6 office is represented this morning by
7 Ms. Brenda Sue Thornton, Ms. Holo Makwaia
8 and myself, Jonah Rahetlah.

9 MR. PRESIDENT:

10 Thank you very much. Could we also have
11 the appearances for the defence side,
12 please.

13 MR. FERRAN:

14 Mr. President, Your Honours, good
15 morning. Batonnier Andre Ferran of
16 Montpellier in France, and I'm here
17 representing Dr. Clement Kayishema.

18 MR. PRESIDENT:

19 Thank you.

20 MR. BESNIER:

21 Good morning, Mr. President. Your
22 Honours, good morning. Pascal Besnier of
23 the Paris bar representing Mr. Obed
24 Ruzindana.

25 MR. PRESIDENT:

1 Thank you very much. Yeah. Yesterday
2 evening when we adjourned -- we are still
3 continuing with the oral presentation of
4 the argument of the defence by
5 Mr. Ferran, learned counsel of Clement
6 Kayishema. Yesterday evening when we
7 adjourned, Mr. Ferran, you were about to
8 embark your evaluation or, rather,
9 discussion of the testimony of Witnesses
10 DN and DO. Could you please continue
11 from there, please.

12 MR. FERRAN:

13 I thank you, Mr. President. Your
14 Honours, in continuation of the analysis
15 of the defence witnesses, I would now
16 like to move on to Witnesses DN and DO.
17 I will examine Witness DP within the
18 framework of what I will say in
19 connection with the alibi that is offered
20 and which -- offered by Dr. Kayishema,
21 which he deems legitimate.

22
23 The -- Witness DN was heard on the 16th
24 of June -- of June 1998. He is a
25 teacher. He can express himself

1 properly. He's of that kind of
2 intellectual level. You will see this in
3 the transcripts, the very transparent
4 oral style he has as you will see in the
5 transcript.

6
7 He said, first of all, that he
8 encountered the events that we have
9 spoken about. There were many
10 roadblocks. Two types of roadblocks for
11 this witness were present in the
12 prefecture of Kibuye. There were what I
13 might call normal roadblocks controlled
14 by people who were asking either for
15 laissez-passers or some other documents
16 that would allow them to know that the
17 people who were moving could move so,
18 could do so for the reasons that they
19 gave.

20
21 Then there was another type of roadblock.
22 At Page 9 the witness said that these --
23 such roadblocks were manned by hooligans,
24 and their aim was to extort money from
25 those who were unfortunate to pass by

1 those roadblocks.

2

3 And this is additionally interesting, and
4 we know definitively that these
5 roadblocks did exist and that they were,
6 as it were, used as a sieve, and they
7 were not necessarily there to ensure
8 security that -- for the citizens.

9

10 The witness went on to talk about, and
11 more precisely, Prefect Kayishema whom he
12 knew. He said, for instance, that at the
13 end of April, beginning of May 1994, he
14 as a teacher participated in a meeting
15 which the prefect held and at which he
16 announced a certain number of principles
17 which I think are useful for our
18 deliberations because these principles,
19 once more, are indirectly connected with
20 what we're pleading, and there is --
21 there is good evidence provided by the
22 witness for our defence.

23

24 And he said that with regard to the
25 minister of the interior and the prime

1 minister, Clement Kayishema said at
2 this -- at the said meeting -- at that
3 meeting that we are in -- in times -- in
4 a time of war. We have to proceed
5 properly. We have to know who the enemy
6 is, and we should not just attack each
7 other. On the contrary, we should know
8 who the enemy is.

9
10 And Kayishema went on to explain, said
11 the witness -- this is at page -- Pages
12 22 and 23 of his transcript -- the
13 witness went on to explain that for
14 Kayishema it was clear -- it was clear
15 that the enemy was not the simple
16 citizen, was not he who was herding his
17 cattle and living peacefully in the
18 neighbouring house, but it was the -- the
19 enemy was he who attacked the country
20 from outside, and he was thus --
21 Dr. Kayishema was thus referring
22 manifestly to the resumption of
23 hostilities by the RPF whom, as you will
24 remember, officially on the 8th of April
25 informed all and sundry that they were

1 resuming the war effort.

2

3 The witness said that at that meeting
4 there were not just students and peoples
5 and teachers. There were also communal
6 leaders, soldiers and gendarmes. He
7 pointed out that there were very many
8 people, and -- this is very important for
9 me at least -- the participants were of
10 various ethnic backgrounds, Hutu and
11 Tutsi. At Page 24 the witness says that
12 there were people of various ethnicities.

13

14 Two brief remarks. The first is that in
15 what Clement Kayishema said, there was a
16 message of peace, at least since there
17 was war. There was a message that suited
18 the time, a message which was a prayer
19 that the civilians be left in peace, and
20 that concern the -- be directed toward
21 the armed people who were disturbing the
22 peace of the Rwandese citizens.

23

24 Second remark on the basis that for the
25 moment the people that are said to have

1 been present were there with all those
2 social strata, the gendarmes, soldiers
3 and so on and so forth. As the witness
4 says, it is sure that this message could
5 not have contained any double-speak; that
6 this message had to be interpreted at
7 face value; and that the prefect who was
8 called Kayishema at the time was a
9 pacifier within the framework of what he
10 deemed to be the mission that had been
11 entrusted to him.

12
13 And further down to a precise question --
14 in answer to a precise question that was
15 put to him in relation to ethnicity, the
16 witness answered as follows at Page 25:
17 The prefect advocated -- he asked that
18 the Hutu, the Twa and the Tutsi live in
19 peace. So there cannot be any doubt, as
20 far as I'm concerned, with regard to what
21 the witness wanted to say, with what
22 consequently Kayishema wanted to -- meant
23 philosophically and morally.

24
25 This Witness DN, he was then questioned

1 about what Kayishema could or could not
2 do at the time under consideration. At
3 Page 33, the witness says that as far as
4 he was concerned he had noticed --
5 noticed that people were rather
6 overexcited -- that was what he said --
7 and that they had started to kill each
8 other and that some people did nothing
9 but that because they had practically
10 abandoned their routine activities, and
11 they were devoting all their time to
12 looting the property of others.

13
14 And in light of this situation, this
15 teacher felt that the soldiers and police
16 officers who were traditionally and
17 legally supposed to help the prefect to
18 re-establish order, to restore order,
19 were not at the disposal of Kayishema.
20 So much so that Witness DN said at Page
21 33 this, In my opinion, the prefect did
22 not have the means to control this
23 situation which had become widespread. I
24 think that these words in -- by way of
25 conclusion speak for themselves, all the

1 more so as they demonstrate further what
2 I have told you since yesterday and day
3 before yesterday on this situation as we
4 should see it. In other words, there was
5 chaos, there was social explosion, which
6 could not be controlled, and nobody, not
7 even the prefect, could control.

8
9 Furthermore, this witness reflects on
10 what he says, and at the following page,
11 he specified that undoubtedly in a normal
12 situation things would have been
13 different, but that the abnormal -- the
14 abnormal side of what was happening in
15 Rwanda at the time was so exaggerated
16 that he was so -- that he was certain
17 that it was not possible to control
18 the -- no one could imagine that they
19 could control the situation.

20
21 He went on to say that the other meetings
22 were convened, and that after the
23 killings the people were buried, and this
24 is -- this corroborates, also, what we
25 already know, and he nevertheless

1 underscores something which to me seems
2 to be fundamental which I hope, Your
3 Honours, you are going to note. It is
4 disputed by the prosecutor, namely, the
5 meaning that should be given to this
6 element. The witness said that the first
7 thing that preoccupied Dr. Kayishema was
8 security and peace within the prefecture.
9 That is at Page 84 of his, of his
10 transcript.

11
12 And he went on to say that, during the
13 meeting that he was referring to, Clement
14 Kayishema said that -- that security was
15 a function of the people who were to come
16 back and do their work -- who had to go
17 back and do their work as they had to --
18 as they were wont to. This is after the
19 tragic events that we know when Clement
20 Kayishema asked the people to go back to
21 their various workplaces and to -- and to
22 carry out their work as usual. It is
23 certainly in his, in his capacity as boss
24 of the prefecture that he's asking the
25 subordinates, the civil servants, the

1 administered, his subjects to go back and
2 do the work that he expected of them.

3

4 And I think this is very clear, and that
5 this witness, whose intellectual level I
6 told you led us to believe that he
7 understood the meanings of words, this
8 witness told us, therefore, very
9 definitively that Dr. Clement Kayishema
10 was not advocating murder but, rather,
11 pacification.

12

13 With regard to those who were violating
14 the law, the witness also noted this and
15 it is very positive. He said that the
16 prefect knew that people were taking
17 advantage of the fighting to settle
18 scores with their enemies. In any case,
19 he was -- he tracked them down and he
20 asked that these people be pursued and
21 arrested. Page 94 of the transcript
22 where the witness says, he said,
23 Kayishema, he said that if there were
24 such people -- consequently people who
25 were violating the law, who had

1 participated or who had done --
2 participated in or done such things, they
3 should be arrested and they -- and
4 punished, and the witness went on to add
5 that effectively all of this was not
6 just -- did not remain a dead letter.
7 Again, and I quote, people were arrested
8 and locked up in Kibuye and in the
9 communal jails.

10
11 This, Your Honours, is a precious piece
12 of testimony, of course coming from a
13 defence witness but a witness who,
14 contrary to what I have said about the
15 prosecution witnesses, is perfectly
16 objective. He expresses himself clearly
17 and transparently, and he gives
18 information that has been corroborated by
19 other testimonies and which corresponds
20 to what is reasonable and acceptable for
21 our deliberations.

22
23 I ask you consequently -- I pray you
24 consequently, Your Honours, when you come
25 to deliberate, to take into consideration

1 very seriously the testimony of Witness
2 DN.

3
4 I would now move on to Witness DO. I
5 think, Your Honours, that you have
6 indelible memory of this man who broke
7 down on the witness stand, and with a lot
8 of humanism, Mr. President, you allowed
9 this man the time to come back to -- to
10 come to grips with himself, and you
11 said -- we said that it was more -- we're
12 not working -- we're working more for
13 history than for the transcripts. You
14 said that in spite of the pain felt by
15 this man the record should show the
16 question that had been put to him by
17 Batonnier Moriceau concerning the loss of
18 his family members in, in horrible
19 circumstances.

20
21 I will not come back to this because this
22 is not -- has nothing to do with the
23 substance, but what I want to underscore,
24 Your Honours, is that, on the one hand,
25 you heard this witness exactly as you had

1 to by allowing him to express his pain,
2 his truth and were the truth
3 corresponding to what is humanly
4 understandable and what is -- what should
5 be expected of a witness, and we were
6 able to obtain through our questions from
7 this witness very tangible information
8 for the, for the deliberations that you
9 have to carry out.

10
11 This gentleman, DO, was heard not too
12 long ago, that is, on the 22nd of July
13 1998, and when Mr. Moriceau asked him if
14 he still had family members in Rwanda, he
15 broke down. This is noted on Page 62.
16 Mr. President, I would like to, to
17 explain for my pleadings what I said
18 about your usual humanism and your
19 concern for respect for those who appear
20 before you here. You said -- I said to
21 you, Do you wish to continue or shall we
22 take a break. So we took a break of ten
23 minutes. You gave this witness ten
24 minutes, which is not slight -- which is
25 not small, at all. In other words, you

1 understood the distress, the pain of this
2 man, which is not subject to dispute at
3 all. You understood his truth.

4
5 This man said that he arrived in Kibuye
6 about the 12th or 13th of April 1994.
7 Everything to him at that time appeared
8 to be calm. In any case, nothing he --
9 he doesn't -- he did not remember
10 anything that was striking or that was
11 the subject for any worry. There were a
12 few incidents, but the town appeared to
13 be very calm.

14
15 What struck him in particular or at least
16 what he did remember was the rumours that
17 were being disseminated and which were a
18 sort of precursor to this collective pain
19 or agony that was imminent, that we're
20 going to find within this psychological
21 crowd which we've talked about and which
22 we are no doubt going to come back to.

23
24 He said that it seemed on the eve -- this
25 is they, that is, the people of Kibuye --

1 they had heard war drums from RPF squads
2 on Mount Karongi. True or false, I do
3 not know. But what is true is that there
4 was some kind of intoxication which was,
5 as it were, which the basis -- the cradle
6 in, in which the tragedy would be --
7 would be rooted in, in Kibuye.

8
9 And continuing along this same path or
10 continuing on this remark, he said
11 everybody thinking that the, the rumour
12 was true was -- started to flee, started
13 to flee but also started to become
14 excited. There was a fight between
15 Jean-Marie Vianney, a member of the R --
16 PR -- of the PL and another individual
17 that broke out, but that is the
18 beginning. Nothing too serious yet.

19
20 And he also hears or he is told -- he
21 also hears that a certain manager, an
22 accountant in Kibuye, had just fought in
23 a bar with people but people who were
24 causing a crescendo in the events. They
25 were -- they killed that individual, and

1 as soon as they killed the individual,
2 they tried to legitimate their acts.
3 They went to search his house, and
4 according to the witness, they found RPF
5 T-shirts, so much so that they realized
6 that they had done a good job no doubt by
7 killing an accomplice of the RPF.

8
9 You will remember this is after 8 April,
10 after the official date of resumption of
11 hostilities, and these people killed this
12 man, and they are satisfied because he is
13 an accomplice. He is hiding in his home
14 proof of his belonging with and
15 participation in the RPF rebellion,
16 therefore, proof of his treachery, of his
17 betrayal, and also camouflaged fatigues
18 of -- for soldiers, boots and a list of
19 RPF soldiers or recruits, as well as
20 training grounds. This is at Page 73.

21
22 What does the witness continue to say?
23 And this is very important, Your Honours.
24 Under these -- the, the tension continues
25 to rise. We are in -- just in Kibuye,

1 just before the Home Saint Jean and the
2 church, 12 -- 12 to 14th. There is --
3 tension is mounting, and on the basis
4 that Vianney had not been killed for
5 nothing.

6
7 The witness went on to say that they went
8 elsewhere to a certain Bosco, a civilian
9 director of -- the chief warder of -- or
10 superintendent of Kibuye prison. The
11 man -- stones are hurled at him. The
12 people said that he had to be arrested
13 because he was an accomplice of the RPF,
14 and in the final analysis, this man kills
15 assailants in his -- in self-defence, and
16 since he was no longer sure that he would
17 remain alive, and fearing that he would
18 be lynched by the people, he committed
19 suicide by firing a shot into his head,
20 and he did not miss the target.

21
22 Now, I just want to stop one second
23 there. You see in four sentences -- four
24 pages of transcript, we have this emotion
25 which I have just recalled a while ago,

1 the subtlety of the human nature flows
2 through these four pages which I've just
3 reminded you about. Through these four
4 pages we've seen what was happening
5 almost on a firsthand basis of -- in
6 Kibuye.

7
8 And the second instance, there is an
9 aggravation of this first phase. We have
10 here in a very -- in an outline, as it
11 were, but in a clear manner, the basis,
12 the foundation of the collective folly
13 or, in any case, the triggering of this
14 kind of chaos that is going to befall
15 Kibuye and the entire area, and it is in
16 this manner that at this man's home --
17 and I go very quickly -- there are papers
18 and notebooks that are found. In the
19 house of a certain Murenzi documents are
20 found, and at the home of a certain young
21 lady who was supposed to be the secretary
22 of the RPF, she -- they went there, too,
23 and she wasn't there.

24
25 At Page 76 the witness said that there

1 was total confusion. People were being
2 killed on the road, and when night fell,
3 looting systematically was conducted in
4 the shops of Kibuye. The tension
5 increases and spreads like a cancer.

6
7 The RPF radio, Muhabura -- Radio
8 Muhabura, according to the witness,
9 continued to maintain this climate of
10 war, of aggression and imminent
11 suffering, and thus, the witness said
12 that this radio was calling on its
13 sympathizers or members to go to the
14 Kibuye parish church at Bisesero. So
15 what happened was a total confusion.
16 Everybody lost their bearings. Folly
17 overcame common sense. I was there. I
18 was an eyewitness. I am an eyewitness.

19
20 I think, Your Honours, that I have
21 nothing to add. These sentences are so
22 eloquent with truth, so fraught with
23 truth, indisputable truth and correspond
24 so much to what I said yesterday that we
25 can, that we can accept that I think that

1 this, this witness, who is also perfect
2 in terms of honesty and desire not to
3 mislead the judges, this man should be
4 considered as one of the cornerstones of
5 our deliberations, of our debates and be
6 seen as one of the best translators or
7 painters of the situation in Kibuye, on
8 the basis of which we have the obligation
9 so as not to be misled, to be fair, to
10 examine the case of Kayishema and to see
11 what he could do and what he could not
12 do, what it was impossible for him to
13 do -- what was impossible for him to do,
14 what he did and what he could not do.

15
16 This witness gives us also some more
17 information which I'm going to go through
18 very quickly. Once recovered from his
19 pain, he tells us that the direct members
20 of his family were exterminated in Zaire
21 during the war of 1995 -- 1995, 1996.
22 Moreover, he specified that it is in the
23 course of the killings, in the course of
24 the genocide which took place in this
25 country, which was affected by the

1 problems, that these people -- that these
2 unfortunate people lost their lives.

3
4 I'm recalling this, Your Honours, not
5 because to dwell on this, but simply to
6 enable you to imagine for a second and
7 through a combination of ideas the
8 difficulties that the defence may have
9 had in finding witnesses because most of
10 them were spread across several
11 countries. The witnesses were not able
12 to survive or, where they were able to
13 survive, they were in such a state of
14 mental and physical despair that it was
15 not possible for us to impose on them the
16 need to appear before your tribunal.
17 This would have been beyond their force
18 or strength.

19
20 Now, I will continue. This witness talks
21 to us about the stadium and tells us that
22 he saw the stadium from a distance
23 because he stayed practically in Kibuye
24 until the beginning of the month of May.
25 He stayed in Kibuye until the beginning

1 of the month of May, and he tells us that
2 he saw the stadium but from a distance.
3 He was not inside the stadium. He also
4 saw all that was happening at the Kibuye
5 church. He saw practically everything
6 happening at that church.

7
8 And he gives us some details which, of
9 course, have their importance, and that
10 is why I think I should give you the
11 details. First of all, he tells us that
12 he noticed -- I am using his
13 expression -- he noticed that gendarmes
14 were seen here and there, that is to say,
15 contrary to what the prosecution wants us
16 to believe. There was not a gendarme
17 platoon. There was not a body of people
18 with caskets or kepis at the disposal of
19 the prefect or any authority to cope with
20 the rioters, but there were a few
21 gendarmes here and there.

22
23 He doesn't know the official secrets. He
24 sees. He's an eyewitness. He saw that
25 there were no movement of armed troops in

1 the form of a platoon prepared for a war.
2 The witness says that he saw here and
3 there these people, but that the
4 gendarmes, which he saw, you would recall
5 that there were over a hundred in Kibuye,
6 these gendarmes could not counteract this
7 crowd movement and the exodus. And we
8 know that this exodus -- I'm repeating it
9 for records -- you know that these
10 refugees were on the whole in order to
11 not go into the details of arithmetic,
12 they were between eight and ten thousand,
13 these refugees. Ten thousand is an
14 average because elsewhere we are told
15 that they may have been 15,000, even up
16 to 25,000, but let us take an average of
17 10,000. I also recall, and this is
18 important, we know that Kibuye had 1,000
19 inhabitants at that time. So,
20 consequently, these 10,000 people who
21 came to add to the population of 1,000 in
22 Kibuye could not obviously be controlled
23 -- be controlled in order to ensure the
24 protection or the safeguard of public
25 order by the gendarmes, especially as

1 there was sporadic disorder here and
2 there.

3
4 The riots, the tragedy was not a single
5 spot or site, even if chronological we
6 could talk of 18 for the stadium, and 16
7 and 17 for the Home Saint Jean and the
8 church. There were cases of violence
9 here and there. There were -- there was
10 plundering, rape in all the nooks and
11 corners of the prefecture and the town.

12
13 The witness tells us that the assailants
14 who came up were very many. I would not
15 insist on this. He once again tells
16 us -- and you would remember this, Your
17 Honours -- he also tells us that there
18 were soldiers who had deserted from the
19 war. They had arms and grenades, and
20 these soldiers -- these deserters who had
21 the ignominy of deserting the -- whatever
22 army they belonged to, these deserters
23 were selling their weapons in order to
24 have some pocket money or maybe to eat.
25 In any case, what is certain is that they

1 sold their weapons in order to find some
2 food. This is what the witness tells us.
3 There were traditional weapons which were
4 also brought in by the mountain dwellers
5 from Kayove and other areas, from Ramba
6 and Gaseke in Gisenyi prefecture.

7
8 Once more, let us stop for a while with
9 your authorization. You, like I, could
10 conclude that these deserters who
11 infiltrated the population were certainly
12 not poets, philosophers looking for
13 inspiration. They were people who were
14 very dangerous. They were bands, and
15 these people moreover sought to -- well,
16 stole whatever they could find in order
17 to sell, And this allows us to see the
18 kinds that could commit. They stole
19 whatever they could steal to have some
20 money, and all of this was an obvious
21 catalyst for disorder and above all the
22 setting into motion of the riot. These
23 people, no doubt, did not stay inactive.
24 They were soldiers. They were deserters.
25 They were of doubtful morality. They

1 were plundering. In any case, what is
2 certain is that they came among this
3 confused people, these parents who were
4 escorting their wives, children, their
5 elders, these unfortunate people hemmed
6 in by conflicting or warring parties,
7 antagonistic armies. These unfortunate
8 people were, in addition, threatened
9 daily by people who were alongside them,
10 by these deserters who were with them,
11 these deserters who, in fact, were
12 hooligans. All of this contributed
13 certainly to the aggravation of this
14 climate, to the worsening of the
15 situation, making the situation more
16 explosive, and the explosion occurred.

17
18 What I would want to say, Your Honours,
19 is that while I want to discuss the issue
20 of ethnicity, I want to finish with this.
21 I want to say -- talk about the rivalries
22 that existed between the Hutus and the
23 Tutsis, the political parties, whatever
24 you want, the sequence of colonialism,
25 the identity cards. I want to discuss

1 all of this. That's fine. But what I
2 want to tell your court is that you
3 cannot judge me on this because you will
4 thereby be doing theory. You should
5 judge me on the totality of the
6 situation, a situation in which ethnicity
7 was only a vector, and you should know
8 and you should tell me whether I,
9 Kayishema, I was only operating in the
10 context of this ethnicity for which the
11 prosecutor charges me or whether because
12 I was the prefect of everyone, including
13 the prefect of hooligans, whether I was
14 in a situation created both by ethnicity
15 as well as the -- by the hooligans and
16 what role I played or what role I could
17 play, what positive role could I play in
18 order to harness the whole situation, in
19 order to control the whole situation. In
20 other words, what is the role of folly,
21 crowd psychology?

22
23 In fact, you have touched with your
24 finger -- you've put your finger on the
25 problem that concerns all of us. What

1 happened exactly? Ethnicity, yes, but I,
2 Kayishema, I cannot be judged on reasons
3 of -- on grounds of politics at a higher
4 level. I, as a prefect of Kibuye, what
5 could I do?

6
7 It would be necessary -- it will be
8 necessary -- it is your duty to
9 distinguish between what was imposed on
10 me, what was inevitable, and this has
11 been mentioned by all those who came
12 here, including the experts. You should
13 distinguish between that and -- that is
14 between what was imposed on me and what I
15 should have been able to do in the --
16 what I should have been able to do in the
17 context of this ethnicity, but the two
18 are inseparable. You cannot
19 theoretically judge me on everything
20 because this totality is undermined by a
21 situation which does not arise only from
22 ethnicity maybe exaggerated by the Hutu
23 power or other parameters.

24
25 I believe this is the crux of the

1 problem, and to judge me properly, you
2 would have to invoke these elements. If
3 you limit yourself to the theory or a
4 theoretical piece in Rwanda or elsewhere
5 will be making a mistake and will not be
6 judging Kayishema, but will be judging
7 some hypothesis, and we're not here for
8 that, and that will be -- it will be too
9 serious to judge a hypothesis and not a
10 man, especially if you have to convict
11 that man.

12
13 In fact, I'm trying to -- I'm beginning
14 to unveil my conviction. In fact, this
15 witness is leading me to that. He's one
16 of the supports of what I'm pleading.
17 He's demonstrating through the oath he
18 has taken, through the accuracy of his
19 testimony, he's demonstrating that I am
20 speaking the truth and that when, when --
21 that I am right to base my defence on the
22 grounds that I'm asking for. I'm not
23 looking for more favourable ground where
24 I will mislead you. I think the idea is
25 that you should judge me as a totality on

1 the foundations which -- the foundations
2 of our debate and not on the basis of
3 text which neither from a factual or
4 legal point of view were applicable at
5 that time.

6
7 I have finished with this witness. The
8 witness talks to us about the church. He
9 talks to us about the stadium. He did
10 not see Kayishema in any manner
11 participate in the acts. That goes
12 without the saying. He didn't see
13 Kayishema at the head of mad crowds in
14 the stadium. He adds that in the
15 meantime -- this is on Page 95 -- that in
16 the meantime there were bandits and
17 hooligans who went to the Kibuye church.
18 All of this, you will find it in the
19 transcripts.

20
21 I'm not insisting on this because it is
22 an illustration. It illustrates what I
23 am pleading. People are killed. He
24 acknowledges that. He accepts that with
25 pay or -- painfully. He doesn't hide

1 everything. He says that he could not
2 recognize anyone among the perpetrators
3 of the criminal acts. This, again, is
4 understandable. He was not at the
5 forefront. He was far, and that is why
6 he survived. That is why he didn't have
7 problems. He also tells us that the
8 soldiers intervened. That we already
9 know.

10

11 The famous Tutsi staff surgeon,
12 Karwanira, is, once again, brought into
13 question by the witness. He says that
14 the military barracks was controlled by
15 the Tutsi warrant officer called
16 Karwanira. He is among these gendarmes
17 who caused a mutiny. I will come back to
18 that when we will be talking about the
19 alibi. He said there was a lot of
20 fighting in the military camp in Kibuye
21 between the Tutsis and the Hutus. In
22 fact, he's there referring to -- well,
23 fighting between the gendarme -- the
24 Tutsi gendarmes and the Hutu soldiers
25 because the two groups were wearing

1 uniforms. That is historically
2 established.

3
4 As concerns the additional information,
5 he talks of Mr. Jabo, and he says that he
6 had to leave the camp or the gendarmerie
7 barracks. The rioters or, rather, the
8 mutineers started their dispute and the
9 separation. He tells us that all that
10 was -- I'm summarizing -- that all that
11 was historically pointed out is correct.
12 Those who were killed were many. It is
13 correct that the Tutsis were killed. He
14 simply says that -- and I believe him --
15 that some of them defended themselves
16 with weapons they had hidden.
17 Nevertheless, they were still victims,
18 these Tutsis.

19
20 He also states that nothing should be
21 added to what has been established, but
22 as far as Kayishema is concerned, he was
23 asked the question as to whether this
24 prefect could, in this social context,
25 whether he could miraculously find the

1 miraculous solution to stop the rioting
2 and killings. The witness says on Page
3 106, As you can see the situation in
4 Kibuye is a situation which, in fact, is
5 difficult, if not impossible, to manage.
6 At least from a personal point of view,
7 it is a situation that is impossible to
8 manage. He has this feeling of
9 helplessness like other witnesses, a
10 situation of powerlessness in the
11 presence of this crowd without a leader,
12 a kind of hydra which is spreading in all
13 directions and killing. He says that he
14 doesn't see how these people could be
15 brought under control.

16
17 On Page 131 he says, and uses this
18 beautiful expression, an intellectually
19 beautiful expression -- he states that
20 when the -- when power is in the streets,
21 everybody uses it. What else can you say
22 after this profound reflection? In our
23 countries, in our respective histories,
24 we know that this statement is true on
25 the basis of the events that we have

1 experienced or learned about. When power
2 is in the street, everybody uses it.

3
4 Power in Kibuye -- I am now stating it --
5 power in Kibuye was in the streets, and
6 therefore, everyone, hooligans,
7 deserters, including people who had some
8 personal scores to settle with their
9 neighbours, all these people took a share
10 of the power, in other words, the
11 liberty, the freedom to go beyond what
12 official power would authorize them to
13 do. Everyone took a share of the power
14 to do what they wanted. This is a
15 situation of anarchy, of criminality.
16 This is power in the absence of any
17 barrier or legal authority.

18
19 As concerns Kayishema whom he
20 approached -- whom the witness
21 approached, the witness said -- and this
22 is important, and this has been verified
23 or corroborated by other testimony -- he
24 said -- the witness said that Kayishema
25 is a calm person, I would even say naive.

1 I'm not exaggerating. He's a rural
2 physician with all that this implies.
3 This is on Page 135 of his testimony.

4
5 He says a few words about the PDC party.
6 Mr. Guichaoua, as you would recall, made
7 an excellent description of this small
8 party which had no future. He talked
9 about the political program of this
10 party, a program which did not
11 practically exist. He talked about the
12 recruitment of members within this party
13 which was practically nil. Accordingly,
14 Kayishema, who is a member of the PDC
15 party, did not have any political future.
16 This is on Page 136 of his transcript,
17 and this was in direct reply to what the
18 prosecution told us, namely, that
19 Kayishema, in the context of the Rwandan
20 tragedy, was kind of -- found a kind of
21 springboard for his future.

22 MR. PRESIDENT:

23 On Witness DO?

24 MR. FERRAN:

25 Witness DO, and I will be concluding on

1 Witness DO shortly.

2 MR. PRESIDENT:

3 This is the summary of what you have said
4 or what?

5 MR. FERRAN:

6 The transcript is very long,
7 Mr. President. The material he gave us
8 is very, is very long, but I took care to
9 distinguish between what I was reading
10 and what I told you is my reaction or the
11 fruit of my intelligence or what -- my
12 interpretation.

13 MR. PRESIDENT:

14 So this is now (Inaudible) evidence of
15 the witness?

16 MR. FERRAN:

17 Yes, of Witness DO.

18 MR. PRESIDENT:

19 Please go on.

20 MR. FERRAN:

21 Thank you. Mr. President, I was saying
22 that I had practically come to the end of
23 this review. I was talking of the PDC
24 party as viewed by the witness. The
25 witness added -- and this is not very

1 kind for Kayishema, but it is fine -- he
2 says on Page 136 that as prefect he was
3 given these lofty duties and he was going
4 to say that he was given this big post
5 because no one else was found for this
6 post. This is not very kind but I think
7 it is true.

8
9 The witness says, moreover, that the
10 political climate was quite unique, and
11 the witness, once again, paints a picture
12 of his thinking which deserves to be
13 reproduced by our reading of his
14 statement on Page 152. He said that the
15 political climate at the time needed
16 someone energetic, somebody who was
17 partisan. The political climate at the
18 time needed someone who was energetic and
19 partisan. What does that mean?

20
21 That means that I, as prefect, I was
22 naive. I was the person who was there by
23 chance. I didn't have the profile of a
24 war leader, and the riot situation, the
25 dramatic situation, the civil war

1 situation, the situation of horror -- let
2 us not be afraid of words -- needed
3 somebody at the higher level, somebody of
4 a greater aura or calibre, somebody with
5 a stronger personality. Maybe, maybe a
6 great leader as we have been taught by
7 history, a Roman leader, maybe a
8 historical personality may have come up
9 and said stop but not Kayishema. And
10 what this man says appears to me, Your
11 Honours, to be illustrative of the truth
12 of the situation.

13
14 He concludes his testimony by saying that
15 the gendarmes went to the front around
16 the 14th or 15th of April. That we
17 already know. Kayishema told us, but he
18 confirms it, the witness, and he also
19 tells us that the barracks was protected
20 by Tutsi soldiers who did not go to the
21 front. They were not called by the
22 government. No doubt they were not
23 called by the government to go and battle
24 with the RPF. The force that stayed at
25 the prefecture of Kibuye was practically

1 nil.

2

3

Page 161 of his conclusion, the

4

conclusion of the testimony of this

5

gentleman, whom I pray you to remember,

6

the conclusion on Page 161 is -- he

7

states -- I'm reading -- Kayishema, even

8

if he were prefect or even though he was

9

prefect, he did not have control over the

10

population. Why? Because during this

11

period of madness, during this period of

12

social psychosis, you need someone, you

13

need someone who speaks the language of

14

thieves. You need someone who speaks the

15

language of the masses.

16

17

Your Honours, this conclusion is so

18

perfect. It indeed reflects what

19

happened, what Kayishema was and what I

20

feel with utmost conviction. In fact, I

21

would not want to distort the scope of

22

this conclusion which in itself is a

23

plea.

24

25

I have finished with this witness, and

1 with him I have finished with the defence
2 witnesses. I would like to recall that I
3 reserved Witness DP to examine him in the
4 context of the demonstration I will have
5 to make in order to avoid -- and I've
6 done so in order to avoid repetition.

7
8 Now, I will move on to Kibuye and the
9 period of 16 to 20 April, the period
10 where Kayishema was there, this man who
11 has been presented to you as a criminal,
12 who failed in all his duties and to show
13 you what this man did, what this prefect,
14 Kayishema, managed during these four
15 days, including the days when he was
16 hiding. Nevertheless, a few words in
17 conclusion on my defence witnesses.

18
19 All the defence witnesses, practically
20 all of them, have told you that Kayishema
21 did not have the profile of a criminal
22 which people think he is. He tells you
23 that this man was powerless to do what
24 nobody could have been able to do in the
25 face of the, the hell that broke loose.

1 The defence witnesses have told you that
2 Kibuye was a boiling pot kind of
3 situation where you had collective
4 madness that moved about, and that nobody
5 in the world -- maybe God, maybe God did
6 not want it -- nobody could stop the
7 situation, nobody could stop the onward
8 movement of this crowd, this mad crowd.

9
10 I would also say that all that I have
11 submitted to you, all the people I have
12 called before your court, all the
13 witnesses that came here took an oath.
14 They did not betray that oath. They said
15 what they thought they should say with
16 regard to the truth. In any case, this
17 is what they had perceived, what they had
18 felt with their hearts, and on the basis
19 of the passages I have selected, you have
20 material to enable you to set aside what
21 the prosecutor submitted, the arguments
22 that the prosecutor adduced, arguments
23 that the people brought by the defence
24 were close to the accused and that they
25 were necessarily the subject of

1 circumspection and that they were of
2 little credibility.

3
4 We should not discredit these witnesses
5 which in any case have to be proven. I
6 think that the defence witnesses came to
7 contribute loyally for the
8 manifestation -- contribute to the
9 manifestation of the truth, and as far as
10 I'm concerned, I'm very proud of what
11 they told us and of the fact that they
12 did not betray the confidence I had in
13 them by asking them to come and take the
14 oath before you.

15
16 Kayishema, from 16 to the 20th, I will be
17 very brief. I will paint a quick picture
18 of what happened during these four days.
19 Kayishema -- we know Clement Kayishema is
20 prefect of Kibuye prefecture, and we know
21 that on the 6th of April he was still in
22 office when the plane of President
23 Habyarimana crashed over Kigali. At that
24 time, he was in his office that night
25 preparing a reception, welcome address

1 to -- for Dr. Booh-Booh who was supposed
2 to visit the prefecture to discuss what
3 should be done to fight the hunger that
4 was hitting the area.

5
6 Then a few -- a telephone call arrived
7 saying that the President was dead. And
8 what did he do immediately? Immediately
9 he called members of the prefectorial --
10 of the prefectorial security council. He
11 did not reach many people. Nevertheless,
12 he was able to bring to -- to convene the
13 commander, Jabo, of the gendarmerie, as
14 well as the prefectorial intelligence
15 service chief. There were not many. It
16 was unforeseen. Nothing was organized.

17
18 So the three of them had the idea that
19 they should go and see UNAMIR based then
20 at a hotel in Kibuye. There was a
21 conversation with colonel -- there was an
22 interview with Colonel Bernard, and
23 Dr. Kayishema was advised to wait for
24 confirmation of what apparently seemed to
25 be true, that is, the accident, the

1 attempt.

2

3 He went back home, and as you can guess,
4 he spent the night thinking on what he
5 would do. The morning of 7 April came up
6 in Kibuye. Kibuye, the town was calm,
7 and nothing was -- there was nothing in
8 the horizon. Everybody, after having
9 received the information about the death
10 of the President, was -- remained calm.

11

12 On the 8th of April he convened the
13 restricted security council, and this
14 restricted security council felt that
15 they should not just limit their contacts
16 with a few -- to a few personalities, and
17 they decided that on the 9th of April
18 there would be a broad-based security
19 council meeting, and at that meeting
20 participated under the presidency or
21 chairmanship of Dr. Kayishema,
22 bourgmestres, subprefects, as those that
23 I mentioned to you when I dealt with the
24 status of the prefect, as well as UNAMIR.
25 In other words, if I were suspected --

1 this is something that gets me out of
2 trouble, UNAMIR is there. It is not I,
3 Prefect Kayishema, who triggered off, I
4 do not know what, murderous mechanism.
5 This is 9 April.

6
7 The security council decided then to ask
8 for gendarmes and -- to ask for gendarmes
9 as reinforcement and decided that there
10 should be a 6:00 to 6:00 curfew, and
11 everything seemed to be along the lines
12 of what should be done to manage this
13 kind of situation. There was no --
14 there's no dispute whatsoever about the
15 convening and the holding of this
16 council.

17
18 It is in the agenda or the diary of
19 Dr. Kayishema. It is on the page of 9
20 April, on Saturday, the security council
21 broadened to include all the
22 bourgmestres, et cetera. I was the one
23 who brought the diary before you. The
24 prosecution did not want it. I brought
25 it, you accepted it, thank you, and I

1 said to you, Your Honours, since I have
2 nothing to hide I'm going to give you --
3 I'm going to show you what I wrote in
4 those days in this register, and it will
5 be left for you to assess this evidence.
6 It is not something that I forged for my
7 defence. It is a piece of truth printed,
8 if I may say so, and I'm asking you to
9 accept it when you weigh your -- the
10 case.

11
12 So I brought this, this, this document
13 before the judges, and it is the
14 intellectual honesty of Kayishema as
15 proof of -- the intellectual honesty of
16 Kayishema to speak the truth. I'm saying
17 I have nothing to hide. When you
18 accepted the document, we -- the --
19 the -- it was -- the other side took
20 advantage of it but that is how the game
21 is played.

22
23 So the security council is held on the
24 10th of April, the following day. This
25 is, Your Honours, four days after the

1 assassination of -- of Habyarimana.
2 UNAMIR stealthily leaves Kibuye without
3 any warning to the prefect, without
4 informing anyone. They just take a
5 French leave, if I may say so, leaving
6 the keys with the messenger or the keys
7 of the premises that they occupied with
8 the messenger. This is completely
9 mind-boggling, but it is history, it is
10 true, and here is Dr. Kayishema in this
11 prefectorial office waiting for orders
12 from the capital, from government first,
13 information here and there.

14
15 There are tremors without there being any
16 upheavals, but there are tremors. There
17 is no country in the world that would
18 take in most calmly the death of the
19 President of the Republic, irrespective
20 of the party to which we may belong, and
21 naturally, there would be some public
22 disorder. If there isn't, there would be
23 at least some psychological disorder.

24
25 So UNAMIR leaves without giving any --

1 without warning anyone, and you know, we
2 do not know who gave the order for them
3 to leave.

4
5 What is true in any case is that, on 11
6 April, Kayishema convened or was convened
7 together with other prefects to Kigali
8 where he met with -- where he met the
9 prime minister and naturally other
10 ministers. He went to that meeting. He
11 went to that meeting with the greatest of
12 difficulty, without any escort. He did
13 not have any special laissez-passer. He
14 explained to us how he was able to go
15 through the roadblocks that were being
16 erected already, some of them very wild
17 with hooligans that you know. He took
18 forever, as you know, to get to Kigali.

19
20 And there, since the RPF was already
21 occupying the official premises,
22 particularly that of the National
23 Assembly, the national development
24 council, the -- these prefects, not all,
25 those who were able to travel to Kigali,

1 met at the Hotel Diplomat. They met at
2 the Hotel Diplomat, and the meeting
3 lasted about one hour, one-and-one-half
4 hours during which during this meeting
5 the prefects were introduced to the
6 minister. There were handshakes, polite
7 introductions were done, and each one of
8 these gentleman was given the floor to
9 give an account or report on what was
10 happening in their areas. They had to
11 report to the -- to their superiors.

12
13 Kayishema asked for soldiers, gendarmes.
14 He said that there was -- there were
15 already dangerous tremors in his place
16 amongst the people and that consequently
17 he should be helped to nip all that in
18 the bud, and he was promised, of course,
19 armed -- the armed forces, police,
20 gendarmes and the army, but he never
21 received anybody at all.

22
23 The instructions that this man received
24 were two things, one, to maintain with
25 makeshift means as much as he could

1 security in the prefecture, bring about
2 calm.

3 MR. PRESIDENT:

4 (Inaudible) down in detail all the steps
5 of the accused's evidence.

6 MR. FERRAN:

7 No, Mr. President.

8 MR. PRESIDENT:

9 We are supposed to (Inaudible) and we'll
10 be able to get it, we hope. So if you
11 could at least focus on what is important
12 arising from the -- all the (Inaudible)
13 that we should discuss.

14 MR. FERRAN:

15 I agree with you, Mr. President,
16 especially as I have already been
17 weakened by fatigue. I think,
18 Mr. President -- Mr. President, I think
19 that I'm not going to go too much into
20 detail, but I think that notwithstanding
21 I should say what --

22 MR. PRESIDENT:

23 Yeah. That does not prevent you
24 highlighting anything that you think is
25 important, but at the same time, I think

1 from the records we have we will be able
2 to trace if -- some of the evidential
3 aspects that have been adduced before us.
4 Please go ahead.

5 MR. FERRAN:

6 Thank you, Mr. President, and with your
7 remark I go a little faster.

8
9 What I want to underscore is that, one,
10 Kayishema did not prepare anything. The
11 events just fell from -- hit him like a
12 bolt from the blue.

13
14 Secondly, when he went for instructions,
15 he did not trigger off any criminal
16 mechanism. What I want to demonstrate is
17 that everything is happening by, by
18 chance. There is nothing that is
19 planned. There's nothing that is
20 envisaged. This seemed to me important
21 because I wouldn't want you to think that
22 I went to Kigali to receive orders. So,
23 I'm saying to my judges that I'm clear,
24 I'm transparent. I did not receive
25 anything anyway that I'm being charged

1 with by the prosecution.

2

3 In any case, when I return I'm told that
4 there are -- that the deaths are already
5 occurring in Rutsiro. So I go to
6 Rutsiro, and there, with your leave, I'm
7 going to refer you to what Kayishema said
8 when he testified. In other words, this
9 bloody riot of 12 April in Rutsiro.

10

11 He went there. He tried to bring about
12 calm with a handful of gendarmes, and he
13 was challenged, and he was nearly hurt,
14 was nearly wounded. A spear was hurled
15 and which, which cut the shoulder, which
16 cut the shoulder of a gendarme who was
17 behind him, and he was able to preserve
18 his life or, in any case, his -- the
19 integrity of his body. So -- and he was
20 able to get away with it therefore.

21

22 Now, it is important, two things. First,
23 Kayishema, prefect, is doing his job as
24 prefect. Secondly, Kayishema goes
25 before, to meet the rioters who are known

1 to be Hutu who had killed the Tutsi. So
2 he was not there to push them, to kill
3 these Hutu or whoever.

4
5 Secondly, the -- up till today the
6 prosecution does not counter -- does not
7 counter what I am saying here. The
8 prosecution does not say I did not
9 participate in the maintenance of order
10 as I should have. On the basis of that,
11 the prosecution should explain to me how
12 I could have gone on to the other side of
13 the events, how I could have done the
14 opposite of my duty.

15
16 On the 10th of April when I am in Kigali
17 I give -- I hand over personally a report
18 of 10 April to the minister. I hand over
19 to the minister the report of 10 April.
20 That is Exhibit 56. That is the report
21 which deals with Kayishema, which --
22 where Kayishema talks about the areas
23 where the first signs of disorder are
24 appearing.

25

1 What I'm interested in, in this reminder,
2 is that I want to underscore that I --
3 the fact that I mentioned what happened
4 here and there, and you are going to see
5 with, with interest that I -- on the 10th
6 of April I am saying I, Kayishema, to the
7 prime minister that Kibuye suffered from
8 inter-ethnic Hutu/Tutsi tension within
9 the framework obviously of the open -- of
10 the conflict that started on the 7 to 8,
11 night of 7 to 8. I say it. I do not
12 hide anything. I inform my superiors, be
13 careful, there is possible slippage, and
14 I say this also at Page 2 later,
15 Hutu/Tutsi ethnic -- inter-ethnic tension
16 and so on and so forth. You're going to
17 see this document, and you're going to
18 see, Your Honours, that first I did my
19 job as prefect.

20
21 Two -- secondly, I informed the -- my
22 superiors of my work of what I -- of what
23 I have seen as prefect. I asked for
24 material means. I asked for gendarmes.
25 I do not just ask for -- make a request

1 to stop the hooligans and the thieves,
2 and I'm talking about everything -- I
3 want to stop everything -- everybody who
4 is making trouble.

5
6 So this, as it were, is the foundation
7 that I needed to lay to -- that -- on
8 which you should put me to judge me
9 properly.

10
11 On the 13th of April, on the 13th of
12 April, very, very quickly, there are
13 refugees who start to arrive. On the
14 14th there is a major wave. Thirteenth,
15 14th, about six, seven thousand people
16 arrive in Kibuye with animals. I begin
17 to be completely overwhelmed.

18
19 On the 15th of April, there are in
20 various parts of my prefecture and in
21 Kibuye riots. These are serious. There
22 is looting, for instance. They loot in
23 the Mubuga trading centre. There are
24 killings and you all know this. I do not
25 want to delve any further into it.

1

2

But what I want to tell you now is that

3

Kayishema was already beginning to

4

realize that everything was going to slip

5

through his fingers, and when we

6

questioned him, when we examined him, I

7

put the following question to him at Page

8

117 of his transcript. What -- at that

9

time, the time I'm referring to -- was

10

your -- how did you feel at that time?

11

Answer: Batonnier or counsel, I do not

12

know the exact words to use, but I felt

13

that there was no longer any authority,

14

any power in the country. This is what

15

the prefect felt in this chaos.

16

17

Nevertheless, he continues to do what he

18

can. At Page 123 of the transcripts he

19

asks the gendarmerie commander to make a

20

report informing the government

21

authorities. These authorities could not

22

be reached. They could not be reached

23

for two reasons. First, there was no

24

telephone. The telephone had been

25

disconnected about the 15th, but in

1 particular -- and history taught us
2 this -- government was moving as -- to
3 go -- as RPF troops advanced. They
4 moved, so when they thought one -- when
5 they were here they were elsewhere. When
6 they were looked for here, they were
7 elsewhere. So much so that during all of
8 this period Kayishema did not have the
9 possibility of getting in touch with the
10 government, and here we are on the 15th
11 of April.

12
13 On the 15th of April, Mr. Jabo went to
14 see the prefect. On the 15th of April,
15 the tragedy was practically there. The
16 Rwandese tragedy was not just in the
17 making. It was practically a fact. It
18 was the, the killings in the church, 15
19 and 16, and the stadium, 17th, 18th.
20 They were already there. We're talking
21 about the eve. There were problems of
22 famine, of food stuff management.
23 Kayishema had to ask the parish priest to
24 supply food to the church and to the
25 stadium. This is in the transcript.

1
2 Jabo went to see him and Jabo said, Sir,
3 I have to leave. I have been
4 requested -- I have been ordered with
5 my -- to come with my valid people to
6 participate in the war, Page 64. He came
7 to tell me. He showed me the telegram --
8 164, Page 164. He showed me the telegram
9 that asked him to take all the forces,
10 all the valid people who were in, in
11 Kibuye to Kigali. This is the 15th of
12 April 1994. It is a Friday.

13
14 The -- Witness DP, a protected witness
15 whom you know, whom you know, says that
16 Kayishema cried, that he shed tears when
17 he was told that they were leaving.
18 Kayishema told me they were -- they are
19 leaving us to our own devices. This man
20 felt that he was being abandoned by the
21 authorities, by those who left him, by
22 those who put him in office. He is not
23 even receiving any support from the PDC.
24 He is alone.

25

1 So he takes out of the 200 gendarmes who
2 were in the prefecture about a hundred
3 and leaves only those who are not in good
4 health. I want you to understand that is
5 the wounded, the aged, the female
6 gendarmes, and of course, the Tutsi who
7 could not go -- who could not go at the
8 request of government to fight against
9 the RPF. It is a kind of Mexican army,
10 if I may say so.

11
12 These hundred people who remained there,
13 these are not brave gendarmes, men and
14 women, who conduct traffic when students
15 come out of school, who go and form a
16 cordon around victims of a crime or
17 something like this, and of course, there
18 is the barracks to be guarded. There are
19 a certain number of things that must be
20 guarded. So we can say that there is no
21 more barrack, gendarmerie barrack as such
22 in the military sense of the word, in the
23 physical sense, virile, if you like,
24 sense of the word. So there is nobody
25 anymore, and Kayishema is completely mad.

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So what does he do? He requests the Red Cross to take the valid people to areas where they can protect it. He is at the same time playing gendarme, prefect, traffic police. He does what he can do and I think in a completely disorderly manner, and I think that the prosecution has not contested this. It is understood, Your Honours. He explained that he asked the prefect of Cyangugu to allow him to obtain assistance for these soldiers, drugs, food. He asked the Red Cross that was on the spot to help him, also. All the services were overwhelmed. All the competent and voluntary organizations were already mobilized, if only in -- with the area where they were installed.

Kayishema, therefore, is totally isolated, totally lost when the intelligence, the prefectorial intelligence officer said to him, Look, you sent me to glean some information on

1 the situation. That was his job, the job
2 of this man. That was his obligation in
3 Kibuye town and in the vicinities. I
4 have just been beaten up, and he had the
5 signs thereof of that beating by
6 gendarmes, gendarmes who came to tell me
7 that today is me and that tomorrow it
8 will be you or this evening. Tomorrow or
9 this evening will be you. You are a
10 prefect. You are against their own
11 views, those of them who remain behind,
12 dissidents. So they're going to make you
13 pay what you -- to take the punishment
14 that you deserve.

15
16 So we should remember that at the time
17 that this scene was happening, at the
18 time that this man came to relate this
19 situation to Kayishema, the riot of the
20 gendarmes had taken place. In other
21 words, amongst the -- in the gendarmerie
22 barracks the soldiers who had remained
23 there had rioted, and we are going to see
24 some of them had seized weapons and had
25 spread around the prefecture of Kibuye

1 commune after having invaded Gatwaro hill
2 where they installed a machine gun, which
3 they used to bombard the gendarmerie
4 barracks which they had left and where
5 those who -- or their comrades who
6 remained were.

7
8 Under the circumstances, it was a
9 complete chaos and total anarchy that
10 reared its ugly head or that reared their
11 ugly head. We could no longer talk about
12 power. We could no longer talk about the
13 reasonable course, but even we could not
14 talk about the protection of life by
15 one's office. The prefect could not say
16 that I was a prefect, therefore, I did
17 not do anything. You cannot -- you dare
18 not touch me.

19
20 People were killed any way and
21 everywhere. There were gunshots. People
22 were, were, were killed with bladed
23 weapons. The prefect heard through the
24 intelligence chief that he was going to
25 pay physically for the collective folly.

1 This man is told today it's you, tomorrow
2 it's the prefect, and this intelligence
3 chief of the prefecture went to tell
4 Kayishema, Look, Mr. Prefect, you cannot
5 remain here, not you, not your family.
6 You have to do what every citizen is
7 doing, insofar as you are here completely
8 lost. You have no power whatsoever. You
9 are the victim. You, you have to do like
10 the thousands and thousands of Rwandese
11 citizens because you are a citizen made
12 of flesh and blood with a spouse and
13 children. You have to leave until there
14 is a lull because if you stay here this
15 is suicide. It's tantamount to suicide.
16 You cannot say that your presence in the
17 prefectorial offices or in your home
18 would be -- would power -- would ward off
19 anything. All of this will be blown up.
20 Everything is -- it is the dike -- the
21 dike is broken and the, the mad flood is
22 coming, and it is sweeping everything in
23 its way. Nothing can stop these crowds.
24
25 Whether they are working on the basis of

1 ethnicism or jealousy or whether they are
2 driven by the quest for money, nothing
3 matters. There is no more morality.
4 There's no more -- respect for life has
5 disappeared. Nobody counts anymore for
6 any reason whatsoever for anybody who
7 wants to kill them. The prefect no doubt
8 crystallizes a lot of acrimony, of
9 antipathy. He is undoubtedly the typical
10 victim if they decide to go to his
11 residence in an official -- or to him
12 officially to make an attempt on his
13 life.

14
15 That is -- this is how, after having put
16 everything on balance, Kayishema decides
17 to leave his residence with his wife and
18 children and to go to the hiding place
19 which we're going to talk about in a
20 while, with your leave.

21 MR. PRESIDENT:

22 Yes. I think this would be an opportune
23 moment for us to take a break.

24

25 We'll adjourn these proceedings up to

1 11:30. So, until 11:30, these
2 proceedings stand adjourned.

3
4 (Short recess.)

5
6 (Pages 1-68 reported by M. Walker.)

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MELINDA M. WALKER, OFFICIAL REPORTER
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1 MR. PRESIDENT:

2 The proceedings are called to order. We will
3 continue the oral presentation in the argument
4 in respect to the defence of Clement Kayishema
5 by Mr. Ferran, learned counsel. Mr. Ferran, I
6 think when we took the break you were
7 discussing -- just about getting to the place
8 where the accused, I think, was about or was
9 going into hiding.

10 MR. FERRAN:

11 That is correct, Mr. President. Indeed I was
12 telling you, Your Honours, that Kayishema found
13 himself compelled for the reasons that I stated
14 in the context which I described, Kayishema
15 found himself compelled to leave his house and
16 his prefectoral residence together with his
17 child and children in order to protect
18 himself. And I was saying that this was the
19 consequence of what the prefectoral
20 intelligence officer had told him in connection
21 with the riot or mutiny that took place in the
22 gendarmerie camp, the mutiny that we have
23 already mentioned.

24

25 And yesterday, Mr. President, you expressed the

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1 wish to know whether some concrete information
2 could be given about this mutiny, whether the
3 mutiny did exist. Yes, the mutiny existed, and
4 we found clear trace of this in the written
5 statement of Witness C.

6
7 Witness C is a prosecution witness. He was
8 heard a long time ago, over one year ago, on 24
9 April 1997. This witness, Witness C, on page
10 115, 116, and 117 of his testimony, stated or
11 said as follows -- said the following with
12 regard to the Mutiny, "People continued
13 discussing this matter. And even the commander
14 of the gendarmes, it is said, that the
15 commander of the gendarmes was himself
16 sympathetic with those who had been killed. It
17 was said that he refused to deliver weapons.
18 Later on, I do not know how they obtained
19 weapons. I do not know whether it is the
20 commander who gave him the weapons, but it was
21 said that he never gave them the weapons."
22 This is in connection with the mutiny.

23
24 To a question put to this witness regarding
25 details of the mutiny and particularly

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1 concerning the gendarme called Bifaro who
2 participated in the mutiny, this is what this
3 witness said. This is what the witness said
4 concerning the rebellion of this man, this
5 Bifaro, rebellion against the authorities.

6
7 He was asked the following question, "Who is
8 this troublemaker? Who is this gendarme who
9 rebelled against his superiors?" He told us,
10 the witness told us on page 116 that, "It seems
11 to me that he was somebody who was rather mad.
12 He was a lieutenant. He was working with the
13 gendarme company in Kibuye. He wanted to kill
14 many people. He was not alone to do that. He
15 had other people who assisted him, and it is
16 these people who took the decision to kill
17 people at the stadium," unquote.

18
19 Your Honours, you will remember that yesterday
20 I talked to you about this sudden change in the
21 attitude of the gendarmes at the stadium.
22 These gendarmes whom we were told were keeping
23 watch over the exits to avoid any unfortunate
24 incident in the crowd, we know that the
25 gendarmes were organizing people coming in and

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1 going out of the stadium. They were keeping
2 watch over the people in the stadium. They
3 were protecting them.

4
5 And then on the 18th the witness told us that
6 suddenly the gendarmes started insulting people
7 in the stadium, they started preventing them
8 from going to fetch water, and, of course, they
9 started preventing them from going out of the
10 enclosure of the stadium. These gendarmes are
11 not the same ones. They are not the ones who
12 were protecting the stadium. Those who were
13 honest refused to rebel against the
14 authorities. Those who on the contrary, who
15 were led by Bifaro, according to the
16 prosecution witness, Witness C, I repeat, "It
17 is they who took the decision to kill people in
18 the stadium."

19 MR. PRESIDENT:

20 Sorry for the interruption. I just wanted to
21 say that for an unavoidable reason we will stop
22 today earlier than our usual time at twelve,
23 because the judges have an urgent meeting that
24 will be starting at twelve.

25

1 I am saying this so that you can organize your
2 work, not complete, at least bear in mind that
3 we won't have that kind of time this morning.
4 And then we will hope to continue our work at
5 the usual three time.

6

7 I was just saying this so that you can organize
8 the argument that you're having, bearing in
9 mind that we have just about twenty-five or so
10 minutes. Okay. Thank you.

11 MR. FERRAN:

12 I am -- I am conscious of what you have said.
13 I'm happy that you are helping me in my work.
14 I'm going to follow your advice.

15

16 So, I was saying, Your Honours, that we here
17 have proof, the best possible proof, if I may
18 say so. We have proof that this mutiny did, in
19 fact, take place since the prosecution itself
20 through its witness gives us proof of the
21 mutiny, a mutiny which, in fact, is not
22 disputed, because this witness was not taken
23 aside by anyone, was not questioned by anyone,
24 and we accepted what he said, what I've just
25 read to you.

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This witness, on page 117, continued to explain who -- to tell us who the killers were among the gendarmes. And he tells us, and this is in answer to a question that was put to him, "Were there other people?" The witness said, "Yes, there was in particular a Luvetu who was a civilian. Luvetu, he was a civilian but he was together with the gendarmes in order to kill and to plunder and commit the worst atrocities.

The witness was asked who this Luvetu was and whether -- and whether the horror that he caused in the streets was just discovered. Witness C answered that, "Luvetu had always been like that, that he had always been a problem-causing person. But on that day he had the head of a person with him. But during the time of the war, what he did was only kill people. He only killed people during the war."

Your Honours, this is an important piece of information. We now have the certainty that when Clement Kayishema tells you that, I had to

1 go into hiding because my life was in danger
2 for the reasons that you know, the reasons that
3 had been given, the reasons that had been given
4 him by the prefectoral intelligence officer,
5 Kayishema said that his life was in danger
6 because other people had left, Bifaro had gone
7 to the front -- or Jabo had gone to the front
8 with the gendarmes and among those gendarmes
9 who were left behind there was a mutiny. There
10 was some separation or conflict.

11
12 And the gendarmes that had caused the mutiny,
13 of course, they took over the leadership of the
14 gendarmerie and turned against us, turned
15 against people in the stadium and also against
16 me, the prefect, who represented authority, the
17 authority the gendarmes had rebelled against.

18
19 And, Your Honours, you know the best proof that
20 can be sought for, that can be found, has been
21 offered by the prosecution and that is that the
22 gendarmes that had mutineered, had gone into a
23 mutiny, were not those who were initially there
24 at the stadium to keep watch under the
25 authority of Kayishema.

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Witness DP, who is a protected witnesses, but you know who this lady is, who this lady is in relation to Kayishema, this witness or this lady came to tell us on 24 June 1998, page 78 of her testimony, page -- "At some point in time the gendarmes started fighting one another. These gendarmes killed one another because they no longer were in agreement."

Well, I think this seals everything. This seals the proof there is absolute certainty now with regard to the development of the situation. The situation developed as the defence told you, or as the defence has been telling you, and this has been proven by evidence from the two parties, both from the -- both the prosecution and the defence.

Kayishema was also heard. He took an oath. And I think in this capacity he deserves the respect. This does not mean that -- well, Kayishema gave testimony loyally before the judges and said the following. He said the following with regard to what he felt, how he

1 felt the need to protect himself and protect
2 his family and how he thought he should leave
3 his post in order to protect himself.

4
5 On 7 September 1998 he tells us, on pages 86
6 and -- 186 and the following, "I asked the
7 intelligence officer to go in town so as to
8 obtain information on the gunshots I had
9 heard. I went back to the prefect's official
10 residence and this man, that is, the
11 intelligence officer, met the group of
12 gendarmes, Tutsi gendarmes who had gone into
13 mutiny. The intelligence officer met them.

14
15 Incidentally, the Tutsi mutineers had gone to
16 plunder. The mutineers hit him. The officer
17 was with -- or, rather, the officer was with
18 another officer or government employee called
19 Alphonse. And they told him, "It is not a turn
20 of the prefect. We are going to the prefect's
21 house."

22
23 Under those circumstances, Kayishema said,
24 "When I was informed of what I should be
25 expecting, namely, an attack, I discussed the

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1 matter with the intelligence officer to know
2 whether he was not mistaken." And the officer
3 told him that he, Kayishema, had to leave. And
4 Kayishema said that Alphonse, an intelligence
5 officer, told me that nothing can be done,
6 considering the mutiny; that nevertheless we
7 had to leave the official residence in order to
8 go into hiding because if the mutineers find us
9 here in our residence, they are going to kill
10 all of us.

11
12 Your Honours, I will stop for a while to
13 respond to the prosecution's argument. What
14 does the prosecution say? The prosecution says
15 a lot of things, but the first thing is that
16 this mutiny is an invention. You would
17 remember Kayishema does not prove, according to
18 the prosecution, that there was a mutiny.
19 Consequently, the reason for your hiding -- the
20 reason for your departure has been invented in
21 order to defend yourself.

22
23 Well, in response to that I will say two
24 things. The first is that I am proving that
25 this mutiny did take place. Prosecution

1 Witness C vindicates me and my defence witness
2 also confirms that.

3

4 The second thing is that I am presumed to be
5 innocent. I am presumed to be innocent. This
6 mutiny was mentioned a long time ago because
7 you heard the witness -- you heard the
8 prosecution witness, the prosecution witness
9 was heard a long time ago, in 1997 in the month
10 of April, on the 24th of April. It was for the
11 prosecution on the spot in Kigali to carry out
12 the necessary research at the appropriate time
13 or before even I had the opportunity to speak.
14 The Office of the Prosecutor had all the time
15 necessary and it was for them, because I have
16 nothing to prove. I am presumed to be
17 innocent. It was for the prosecution to
18 provide evidence that I was lying, that I was
19 mistaken, or that I was inventing things to
20 defend myself.

21

22 We are in the context of a very strict
23 proceedings, strict especially as you are very
24 demanding because what is sought from you is
25 not just anything. It's not every day that

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1 certain life sentences or sixteen life
2 sentences are proposed against an accused. So,
3 you are not going to leave anything to chance.
4 And if I have my back against the wall, since
5 I've been brought here as -- well, you're going
6 to bring in a balance, and you should say that
7 all that the prosecution has said does not
8 interest you; that you, as judges -- you, as
9 judges, you have to strike a balance; and that
10 the accused is presumed to be innocent.

11
12 You have the duty, and I'm sure you would carry
13 out your duty, you have the duty to tell the
14 prosecution that if Ferran says that there was
15 mutiny and if you're saying that there was no
16 mutiny, you should bring evidence to show that
17 there was no mutiny.

18
19 Here I am very serene. I am very comfortable
20 with my argument. And so far the prosecution
21 has not been able to prove the contrary,
22 namely, that there was no mutiny.

23
24 Well, you will tell me that all of this brings
25 us to the alibi, that all that the defence is

1 saying is the alibi that we dispute and that we
2 do not accept the alibi because both from a
3 legal and factual point of view you cannot
4 offer an alibi.

5
6 Well, this is interesting. Do you want us to
7 explain in the next ten minutes we still have
8 the alibi? It is so clear. The problem raised
9 by my adversary, first of all, the prosecution
10 tells me that with bad faith that you -- that I
11 maliciously, I flaunted Article 67 which
12 compelled me -- which compelled Kayishema to
13 argue his alibi. Well, I will tell the
14 prosecutor through the judges that he is very
15 daring, he's very daring because the same rule
16 -- the same Rule 67, you know it better than
17 me, imposes on the prosecution the obligation
18 to disclose to me before the beginning of the
19 trial the number of its witnesses.

20
21 You have been following our argument very
22 closely and you know that my dates are
23 correct. I did not have any document from the
24 prosecutor until after the trial started. I've
25 already stated that. And now the prosecutor is

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1 reproaching me that it has nothing to prove
2 concerning its -- its delay regarding the
3 implementation of the rules. I think this is
4 intellectually insolent and daring. That is my
5 first observation. We complained about this.

6
7 The conduct of the proceedings teaches us that
8 other witnesses were added. We had testimony
9 given in English. And all of this has been
10 forgotten by the prosecutor. Yet you are asked
11 to shackle us. Whereas, the prosecutor can do
12 what it wants, when it wants, and where it
13 wants. I think the establishment, the
14 restoration of fairness, would compel the
15 prosecutor not to reproach me as they did. And
16 they should look at the speck in their own eye
17 before trying to pick out the lock from my
18 eye. That is my first observation.

19
20 I look at my file or the transcripts of 26 June
21 1997. Rule 67, regarding Rule 67, you rendered
22 a decision on 15 June saying that the defence
23 -- if the defence had a witness to call, he
24 should call the witness. Well, the meaning or
25 the purpose of this rule is to enable the other

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1 party -- is to enable the other party to
2 furbish or prepare its case, to prove, for
3 example, that I was not hiding on the day that
4 I said I was hiding. And the other party tells
5 us that because I did not say that I was
6 hiding, that they could not do any
7 verification. In fact, if that had been the
8 case I do not understand anything.

9
10 The other party's documents show that there are
11 many witnesses saying that -- many witness
12 saying that I was --

13 THE INTERPRETER:

14 Could Counsel take that again? Could Counsel
15 take that again and maybe go more slowly for
16 proper interpretation.

17 MR. PRESIDENT:

18 Would you go over more slowly what you were
19 just saying? The interpretation booth would
20 like you to say it again.

21 MR. FERRAN:

22 I was saying, Mr. President, that this rule,
23 this obligation on the parties to disclose or
24 offer a defence of alibi, here the prosecutor
25 cannot say that since I did not tell him that I

1 was hiding, he, the prosecutor, could not rebut
2 my defence or prove the contrary, because his
3 own file from A to Z contains many
4 demonstrations that I was not hiding, since all
5 the prosecution witnesses saw me everywhere.

6
7 Now, when the prosecutor tells me that the fact
8 that I did not in advance say that I was hiding
9 prevents the prosecution from proving the
10 contrary, but this is what you did,
11 Prosecution. Consequently, the fact that this
12 rule, according to you, was not applied had no
13 consequence for you. Therefore, why do you
14 engage in this debate? In what way -- if I had
15 told you that I was hiding, in what way would
16 you have been able to bring other witnesses,
17 saying that I was seen at the church or
18 elsewhere? You have done this for the last --
19 throughout the proceedings. Consequently, what
20 you're saying is purely theoretical. It is
21 simply to obstruct what I am demonstrating.

22
23 From a legal point of view, from the spirit of
24 the text or the rule, from the standpoint of
25 the implementation of this rule, in the wisdom

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1 of the jurists, the prosecutor cannot complain
2 about anything because I did not prevent the
3 prosecutor from demonstrating the contrary of
4 what I was arguing, because all the prosecution
5 witnesses say that they saw me elsewhere, other
6 than in the hiding place I mentioned. I do
7 not, therefore, see how or in what way the
8 prosecution could have proceeded otherwise, if
9 I had informed the prosecution that I was
10 hiding.

11
12 In any case, I informed the prosecution that I
13 was hiding. I did so after your decision. You
14 remember, you rendered a decision on 15 June
15 saying -- I'm trying to repeat your words. The
16 defence -- according to the judges, you were
17 saying that the defence witnesses are appearing
18 and that if the defence witnesses are offering
19 alibi, that the defence should say so. Now,
20 there is a defence of alibi. This is what you
21 said on the 15th of June.

22
23 I do not have many witnesses. My witnesses
24 have either disappeared or are dead.
25 Kayishema, when he appeared before your court,

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1 said that indeed -- said that he told the
2 counsel, me, that he offered the defence of
3 alibi, that he was hiding. I wrote to about
4 ten or twelve persons because this was of great
5 interest to me. I wanted to begin my work on
6 this alibi. The letters came back to me.

7
8 In any case, what is certain is that for one
9 year, one and a half years, I ran after a
10 witness who could show, who could prove that I
11 was hiding. Therefore, I could not tell the
12 other party officially that I was going to
13 offer a defence of alibi so long as I was not
14 sure that I could prove the alibi. This is
15 fundamental. This is elementary. It is
16 obvious.

17
18 On 15 June when I received your decision, I
19 know that witness -- I knew that Witness DP was
20 going to come. And he came on 24 June.
21 Witness DP -- Witness DP came on 24 June and
22 brought me the proof that I was hiding. We're
23 going to discuss this later on. Witness DP
24 said that I was hiding, that I was hiding with
25 my wife and children.

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On 24 June, I was not the one cross-examining. I had the transcripts fifteen days later. What did I do? I examined them. And when I returned here to see you in August, I officially, one month later, disclosed to the other party that I had a witness. What else could I do? What else could I reasonably do?

The other party could have informed me of all its witnesses before the beginning of the trial as required by the law since he had been working with the staff since 1995. Yet he did not do so, and now he tells me that I should have done what he -- I would have met obligations which he himself failed to meet. I think this is quite unique. This is quite singular.

In any case, what is certain is that my alibi remains because over and above the winds and caprices of the prosecution, the fact of not notifying does not amount to nullity. My alibi is there and of course you are going to examine it, as you know you are going to do, because

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1 these people came, they told you what happened,
2 what happened exactly.

3

4 It is under these circumstances, Your Honours,
5 that I could, if you please, in the afternoon
6 present to you the hiding place where I was,
7 talk about it with you, and will reflect maybe
8 on what consequences could be drawn therefrom
9 and what we could think of it.

10 MR. PRESIDENT:

11 Yes, we will stop here, and we will resume our
12 work at three, at the usual time, for
13 Mr. Ferran to continue with his oral argument
14 on behalf of the defence of Clement Kayishema.

15

16 So, until three o'clock this afternoon, these
17 proceedings stand adjourned.

18

(Break.)

19

(Pgs. 69-88 by S. Kohn, Reporter.)

20

21

22

23

24

25

1 MR. PRESIDENT:

2 Yes, the proceedings are called to order. We
3 will continue with the oral presentation by Mr.
4 Ferran.

5

6 Mr. Ferran, you were discussing the alibi.
7 Could you, please, proceed.

8 MR. FERRAN:

9 Thank you very much, Mr. President. Indeed I
10 was saying this morning when we concluded that
11 Clement Kayishema for the reasons that I gave
12 you, which were reasons of security, was obliged
13 to leave his residence, his official residence,
14 to hide, his family home and to hide and he
15 explained. I do not want to come back to it. I
16 think he was clear.

17

18 In certain unoccupied houses he told us who they
19 belonged to and more specially who had lived in
20 those houses and the people had left those
21 houses during the events between the 16th to the
22 20th. I do not want to come back. I know that
23 you have noted what I said.

24

25 I also said, your Honours, that the problem of

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1 procedure raised by the prosecutor did not seem
2 to me to be well founded and they were not in
3 their place.

4

5 So I have finished with that and I will now go
6 on to the next idea which interests me more,
7 namely, the credibility of the alibi that I
8 offer you so that you can offer -- you can judge
9 me based on profound truth.

10

11 I am charged or reproached for not having said
12 on the 17th of July when I was interrogated by
13 the investigators of the prosecutor that I had
14 gone into hiding.

15

16 Kayishema answers -- Kayishema answered because
17 during the testimony given by the accused we
18 opened discussions. There again we did not hide
19 anything. We tried to be as cooperative as
20 possible with our judges.

21

22 And I would like to recall what Kayishema said
23 without going into the reading of the
24 transcripts. Mr. President, already pointed
25 out, of course, all of that will be read and I

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1 know it. Therefore, I will go to the salient
2 points of the analysis.

3
4 Kayishema in this respect said that he did not
5 give the information that he was giving today or
6 on the day of his testimony for the very simple
7 reason that it had been agreed upon by the -- by
8 us since I was present as the advocate and the
9 investigators, that it had been agreed that we
10 would discuss only general matters, we would
11 deal with general matters only relating to
12 Rwanda and the events perhaps including the
13 prefecture of Kibuye but nothing specific and
14 nothing special or specific to the accused would
15 be raised.

16
17 We took this step because we did not have the
18 case file and that was the reason and it was one
19 of the technical details of the prosecution that
20 have been instituted against us.

21
22 The text supporting this prosecution, this case
23 had to be made available to us so that we would
24 know it inside out and know the means or the
25 evidence that the prosecutor wanted to bring

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1 forth against us.

2

3 We noted we were not obliged to do so, not
4 legally, and since we were -- we did not have
5 this text we agreed. This has been our line of
6 conduct, policy since the beginning of this
7 trial.

8

9 We accepted and we wanted to give testimony
10 which certainly is the best proof that I can
11 give of the fact that Kayishema is a loyal
12 person and that he does not hide what you need
13 to know, your Honours, to be able to judge him.

14

15 It was understandable that the accused did not
16 give with regard to his private life at the time
17 these details. It was -- it was convenient. It
18 was worth what it was worth. We decided to do
19 so. I do not see why today I am reproached for
20 it.

21

22 I'm also told that when Kayishema was
23 interviewed by the -- with the consent of the
24 defence on the 6th November 1996 he said that he
25 was in hiding but that he did not say that he

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1 was in hiding in the houses which I have
2 indicated were those that he withdrew to from
3 the Kibuye life over a period of four days.

4
5 He explained that he had to elude the question,
6 that he answered more or less burying his head
7 in the sand like an ostrich, holding something
8 back, you know, something that he was reserving
9 for the Tribunal. He hid something that -- held
10 something back that he had to say but he held it
11 back for the Tribunal.

12
13 He agreed to answer the questions. He accepted
14 to answer the questions and I do remember -- I
15 think it was honourable Judge Ostrovsky who put
16 the question to him. "Now, Dr. Kayishema, why
17 did you not tell the investigator, it was quite
18 simple, that you were hiding in those houses?
19 Why did you say that you were hiding in your
20 home?"

21
22 What does the accused -- how does the accused
23 answer the question? He said, "Certainly I
24 could have answered. I could have said it
25 effectively but on the spur of the moment since

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1 I did not have second thoughts I could not make
2 mention of the owners of the houses because in
3 1996 I did not know what had happened to the
4 property. I did not know what happened to the
5 owners of those houses. I had an impulse, maybe
6 a stupid impulse, so impulsively I said that I
7 was in my home."

8
9 So honourable Judge Ostrovsky said, "You were
10 not going to put those owners at any risk if you
11 said that you were hiding in their houses."
12 That is true, your Honours, but I think that --
13 is it so unreasonable to accept that Kayishema
14 wanted to not mention those people even if they
15 were not risking anything without going deep
16 down in the arguments that you advanced?

17
18 Kayishema is an intelligent person. Professor
19 Pouget said it. You also remarked this during
20 the very long examination in chief that I
21 carried out and you saw how he was, how he could
22 adapt intellectually to situations. How could
23 you think, therefore, that this man could have
24 changed versions if there were versions before
25 the judges whereas the question that you,

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1 honourable Judge Ostrovsky, put to him was
2 inevitable. The question was simple. Was it
3 necessary to continue to elude the answer, to
4 continue to not say what had happened? Once we
5 had taken the oath to say, sir, conclude, draw
6 whatever conclusion you want but that is what
7 happened and the proof, the best proof that I
8 could not hide in my home, your Honours, and
9 when I say that I could not tell the
10 investigators, I could not translate the reality
11 of things, it is because one cannot hide in
12 one's own home.

13
14 If one is threatened, if one fears that one is
15 going to be attacked and killed because one is a
16 prefect in one's residence or in one's home,
17 which is not so far away, one does not remain in
18 one's home. One goes elsewhere. So, now, the
19 problem with the elsewhere. One says one
20 doesn't say what one is established, is not
21 established. One is -- the fact that it was not
22 that immediately, that what was said under oath
23 was not said immediately doesn't mean that the
24 testimony is not credible, that it doesn't mean
25 that we are -- it does not mean that we are

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1 lying. I think this is very logical.

2

3 Kayishema knew the case file I would say much
4 better than -- probably better than myself, and
5 I have told you what was said. We discussed the
6 matter and I said, Kayishema, because I'm your
7 counsel tell the judges what happened and they
8 will understand you because if the testimony is
9 too lightly articulated to harmonize, to
10 harmonize, as it were, too harmonious, rather,
11 as Judge Ostrovsky said, you know, those who
12 want to be -- to demonstrate too much do not
13 succeed in convincing. The testimony is not
14 something that is built up like cubes. So the
15 testimony, otherwise we would never have any
16 testimony at all.

17

18 So consequently what Kayishema said is simply
19 basically the truth, the truth for which he had
20 no reason to hide, hide it from you. So this
21 truth generated for him on the questions,
22 nothing but questions. If he had not -- he told
23 you, therefore, what was the truth and I think
24 that we should stop there and the barrier
25 between -- the barrier that may impede our

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1 reflection, when we go deep down in our
2 thoughts, when we reflect deeply on this matter,
3 we realize that he was right.

4

5 The prosecutor tells me that, well, Dr.
6 Kayishema, you never put this down in your
7 diary.

8

9 The prosecutor, Madam Prosecutor, I did not put
10 down everything in my diary. If I had put down
11 everything in the diary I would have been
12 asked -- well, Doctor, how do you say that? You
13 say that you were in the banana farm, that you
14 took your diary and you noted down that you were
15 hiding, you are organizing your defence because
16 logically when, reasonably when he who is in
17 hiding does not put note, does not write down
18 the fact that he is in hiding, and I think that,
19 you know, it is clear that this kind of
20 information should be left out of the diary.

21

22 I have also told you you have in this diary, Dr.
23 Kayishema, you noted down that during this
24 period you carried out sensitization or
25 something, pacification.

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1 Yes, Madam Prosecutor, this is true. It is true
2 because I had planned to do these things over
3 the following weeks without knowing what would
4 come in terms of a bloody hurricane over my
5 prefecture. I did not rub it out. It is not
6 because I wrote it down, that, you know, I was
7 not in the banana farm, in the house, that I was
8 elsewhere.

9
10 I think that again that is a perfectly
11 reasonable explanation and that we cannot, your
12 Honours, unless we assume that my presumption of
13 innocence is supposed to be irreversed,
14 demonstrate systematically that I am not guilty
15 and I think you cannot assume this attitude, the
16 explanation that is given by my client which I
17 reproduce today is to me so simple, so
18 simplistic that I think I have the impression
19 that I am wasting too much time dwelling on the
20 matter furnishing explanations.

21
22 Kayishema, he also said, well, this meeting of
23 gendarmes, Kayishema, is not recorded. I will
24 make the same remarks. How would that have
25 demonstrated, the fact that this is not

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1 recorded, how would this have demonstrated that
2 I was not hiding? What is the relationship?
3 What is the relationship to this?
4

5 Now, maybe we should stop at one moment. We
6 should stop speculating and we should try to
7 look for a small, for a tiny thing that proves
8 that nothing can be taken for granted. We
9 cannot reasonably bring -- disprove what this
10 man is saying. There is nothing to disprove
11 what he is saying. So we must admit that he
12 went into hiding. This episode is fundamental
13 and I do not underestimate the difficulty that
14 the prosecutor and which I have myself had in
15 working on this evidence because it is either
16 everything or nothing. Either I was in hiding
17 or I was not. If I was not in hiding then it is
18 certain that my alibi collapses. If I was
19 elsewhere, if I'm elsewhere I have to
20 demonstrate that where these people opposite me
21 said that I was. I think I have demonstrated
22 it.
23

24 But the first thing I think is to be believed is
25 my alibi, I think. This alibi is confirmed by

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1 my spouse and by -- of course, the meeting of
2 the gendarmes, this witness came. I mentioned
3 him this morning and I read some of the passages
4 from his testimony, some passages from his
5 testimony, and this witness came here and he was
6 questioned about Kayishema.

7

8 Your Honours, with your leave I would like to
9 correct something that I think is an involuntary
10 error on the part of Miss Thornton or the
11 prosecutor but which is important.

12

13 Witness DP was examined by Miss Thornton on 24th
14 of June 1998.

15 MR. PRESIDENT:

16 Which witness?

17 MR. FERRAN:

18 DP, DP, D, D, DP, Mr. President.

19 MR. PRESIDENT:

20 Defence witness, yes, he was cross-examined?

21 MR. FERRAN:

22 Yes, yes, he was cross-examined. He was
23 cross-examined.

24 MR. PRESIDENT:

25 Yes.

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1 MR. FERRAN:

2 There is a lapse, Mr. President. He was
3 cross-examined by Miss Thornton. It is the
4 transcript of 24 June 1998, Page 110, and you
5 will see that this is not just a detail and I
6 want to dwell on it because I do not want to
7 leave such a -- this error in the case file.

8

9 I would read the questions and the answers
10 given.

11

12 Question from the prosecutor: "Your wife --
13 your husband did not -- was not on good terms
14 neither with Karwanira nor with the Tutsi
15 gendarmes in the place. Is that right?"

16

17 Answer: "That is true. He was not on good
18 terms with the Karwanira group."

19

20 Question: "And he had to be eliminated, isn't
21 it?"

22

23 Answer: "If he had had the opportunity of
24 getting his hands on him he would have killed
25 him."

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1 The transcript allows us to think that Witness
2 DP, who is very close to my client, was not
3 accusing his -- her husband of wanting to kill
4 the gendarme but the reverse.

5
6 What she was saying was that if Karwanira and
7 his group had the possibility of getting their
8 hands on him, that, one, he would have been
9 killed. That is what comes out of -- what
10 transpires through these transcripts.

11
12 When Kayishema goes up into the witness dock
13 before the Tribunal Miss Thornton says to her in
14 the cross-examination, your spouse -- that is
15 Page 25 of the transcript of 15 September --
16 "Your spouse also told us that you did not like
17 him, the gentleman in question, because he was a
18 sympathizer or follower of the RPF and she
19 testified in this courtroom saying if my husband
20 had had the opportunity of putting his finger,
21 hands on him he would have killed him. And so
22 he would have killed him. So it means you did
23 not like that man. Is that right?"

24
25 So the prosecutor is making the witness say

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1 something that -- putting words in the witness'
2 mouth. In other words, if her husband had
3 managed to put his fingers on that man he would
4 have killed him. This is not just -- this is
5 not to be taken lightly.

6
7 Kayishema never wanted to kill anybody and the
8 witness never said that Kayishema wanted to kill
9 the gendarme or anybody whatsoever. This is
10 just a -- this is a parenthesis.

11
12 I want to respectfully draw your attention to
13 this passage because I do not want that the
14 prosecutor draw the conclusion that I was
15 decided, I made up my mind to kill a Tutsi or
16 follower of the RPF, that my wife swore to it.
17 It is not so.

18
19 I am not saying that the prosecutor maliciously
20 transformed. I am saying that she
21 misinterpreted what was said and I'm asking you
22 strongly, but respectfully, to bear this in mind
23 when you deliberate, when you look at it you
24 should consider, you should look at the
25 transcripts so much so that I would not be

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1 considered a potential killer because my wife
2 did not say anything of that nature concerning
3 me.

4 MR. PRESIDENT:

5 What do the transcripts say on their face, on
6 the face of them? Are you saying what they
7 reflect is not correct? What do you get the
8 sequence when you read the transcripts on this
9 issue concerned?

10

11 It is one thing to say, for example, that the
12 transcripts are mistaken but also saying that
13 though the transcripts reflect this but the true
14 meaning we contend is this. What is your
15 position?

16 MR. FERRAN:

17 The transcript was well done. All I'm saying is
18 that Miss Thornton misinterpreted the position
19 of Witness DP and put words into that witness'
20 mouth that she was -- that she did not mean.

21

22 We just have to read the transcripts of Witness
23 DP to realize this; namely, that the formulation
24 of Miss Thornton was not right, was not good,
25 and since it is an important aspect I want to

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1 take the liberty of drawing your attention to
2 it.

3 MR. PRESIDENT:

4 In other words, Mr. Ferran, you are saying on
5 your part if one looked at the transcripts as
6 they are it will come out that what, the kind of
7 inference that Miss Thornton seemed to have
8 drawn out of that text is not correct.

9 MR. FERRAN:

10 Exactly. It does not correspond to what the
11 witness said, Mr. President.

12 MR. PRESIDENT:

13 (Inaudible) -- as reflected in the transcripts?

14 MR. FERRAN:

15 Yes, yes, quite so, and the transcripts are
16 correct, both sides.

17

18 And, madam, once again I'm not challenging your
19 honesty or anything. Once again we can have
20 this situation --

21 MR. PRESIDENT:

22 It is not a question of, for example, at a later
23 stage there may be a need to check exactly what
24 she said on this particular point?

25 MR. FERRAN:

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1 No.

2 MR. PRESIDENT:

3 No?

4 MR. FERRAN:

5 No.

6 MR. PRESIDENT:

7 We take note of that.

8 MR. FERRAN:

9 No, because it is important, Mr. President, I
10 would not have made this remark unless it were
11 important. It's because of the intention that
12 is or the intent that is lent to my client by
13 the prosecution. Thank you, Mr. President.

14

15 Now, to finish what my explanations on this, to
16 conclude my explanations on this in terms of
17 Kayishema from his office and from Kibuye, as it
18 were, we have another problem that we all
19 considered.

20

21 Did Dr. Kayishema have any other solution than
22 to go into hiding? Could his office compel upon
23 him to risk his life? Could he as a family
24 head, a responsible family head or did he
25 have as a responsible family head take note of

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1 the fact that he was, he had this, he occupies
2 this kind of position and act consequently?
3 This is something that is important.

4
5 Witness DP explained that the gendarmes had gone
6 to the front, the gendarmes of Mr. Jabo, and
7 that there was no more authority in the commune
8 and that Kayishema -- I said it this morning and
9 I would like to recall it for the needs of my
10 pleadings -- Kayishema said that he had been
11 abandoned to himself.

12
13 When this lady was heard on the 24th of June she
14 explained all of this. She explained the mutiny
15 of the gendarmes as well as the conditions under
16 which the family left. The witness having
17 been -- was heard. Some questions were put to
18 her and I think again it was Judge Ostrovsky who
19 put the question to her and I think it is the
20 transcript of 24 June 1998.

21
22 The honourable judge said that to the witness,
23 "Could the prefect have gone into hiding without
24 having, maintaining contact with his
25 subordinates and his superiors?" Because the

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1 prefect had the duty of overseeing, of
2 controlling the situation, in other words, the
3 prefect in spite of his obligations left his
4 post and he was -- and went into hiding for a
5 few days without maintaining contact with his
6 superiors. This question is important and
7 appropriate, your Honours, and I'm not going to
8 bypass it. It is a question that should come to
9 the minds of all of us.

10
11 The first remark I want to make in this regard
12 is this, that the fact that I had not met my
13 obligations, that I did not discharge my duties,
14 that I might not have discharged my duties, the
15 fact that I might not have discharged my duties
16 is something totally different from what I am
17 reproached of. It is totally different.

18
19 I am not being -- I'm not put on trial here
20 because I did not perform my duties as prefect.
21 I am not on trial because I went into hiding.
22 I'm on trial because I am told, and I'm going to
23 come back to it, that I had the power of doing
24 something that I did not do. That is the crux
25 of the matter that is before us.

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1 So I'm going to very rapidly tell you this, that
2 following what Dr. Guibal said, what Dr.
3 Guichaoua said, following what the reasonable
4 and serious, all the reasonable and serious
5 people said before the Tribunal here, that at
6 the time of the events, the events we are
7 talking about, Kayishema could not strictly do
8 anything, strictly he could not do anything.
9 There were no more gendarmes in the commune, no
10 useful gendarmes. Jabo had left. His
11 replacement had not yet arrived. Kayishema
12 could not have at his disposal some communal
13 police officers whatsoever first because they
14 had just in small number, just about eight, ten
15 or fifteen theoretically around him, but
16 practically there was none at all because each
17 in their own sphere was going about what they
18 deemed best in a rather disorderly manner.

19
20 I have told you what our legal requisitions
21 represented and I have told you what, how --
22 what Kayishema could get the gendarmes to do or
23 could not get them to do and how the
24 requisitions could not have any force of law,
25 could not have been enforceable. He was alone.

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1
2 Therefore, under the conditions, under these
3 conditions and when I look at the indictment, as
4 well as the pleadings or the arguments of the
5 prosecutor, I'm going to come back to this, but
6 already we should note that at the time that
7 Kayishema is in hiding, he is abandoned by
8 everybody, he is alone and his spouse tells the
9 judges that -- the question is put back to her
10 and she answers on the 24th of June at Page 76,
11 I think, that before he was -- prior to his
12 appointment as prefect he was a normal citizen
13 like any other one, like all the rest. He could
14 not do anything to ensure that the prefect
15 provide security to the people. There is a
16 precondition. He has to have the means.
17 Therefore, I think this is said by a woman who
18 likes her husband, by a woman who has a minimum
19 of common sense, and we cannot ask somebody to
20 do the impossible and in particular to do what
21 no man in the world could have done. One in
22 particular cannot ask somebody to be -- cannot
23 ask him to be a hero. He is a man like any
24 other one and if you like symbolically to have
25 his cape, his cap -- if you like symbolically

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1 his cap, his outfit, his prefect's apparels had
2 been removed. He was there with his anxiety,
3 with his suffering, with his sentiments of
4 helplessness, and Kayishema said it on the 7th
5 of September when he was heard by your
6 Tribunal.

7
8 He said at Page 207 in spite of the threats that
9 I received I thought that I should see whether I
10 could find somebody or some other means of
11 obtaining assistance or whether I could do -- or
12 to do what I could do but it was not possible.
13 It was by far, by far, by far beyond the
14 abilities and means that I had.

15
16 And at Page 209 he concludes the power of
17 requisition I had but requisition is only issued
18 where there is something to obtain but there was
19 nothing to obtain through requisitions. The
20 communal police obviously were elsewhere. There
21 was -- it was a real scourge. And I'm quoting
22 him. It was total chaos.

23
24 So these are the conditions under which Dr.
25 Kayishema was hiding over the two days --

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1 sorry -- four days that I have mentioned to you,
2 16 to 20, and under the material conditions that
3 I have told, recollected here.

4

5 What I note is that in such a case, the reaction
6 in such a case of a responsible person is not
7 what you always expect. Others may have been
8 killed on the spot.

9

10 There are captains during a shipwreck who cannot
11 do anything and who accept to die with their
12 crew on the ship and they sink with the vessel.
13 Other captains think that when it is not
14 possible to do anything and if it is possible
15 for them to save themselves, well, they think
16 that it is better to protect their lives. If
17 you have no reason for losing your life I think
18 it is as well reasonable to saving, and
19 Kayishema, like the captain of a vessel who
20 realizes that the ship is sinking, that there is
21 nothing to do, chose to protect his life.

22

23 Can we reproach him for this when others are not
24 reproached for similar acts? I think it is
25 unfortunate, it is regrettable and unfounded on

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1 the part of the prosecution, especially as Mr.
2 Nsanzuwera who was nevertheless state counsel in
3 Kigali, he was not just anybody -- I have a lot
4 of respect for the judges, the prosecutors, even
5 if they are my adversaries, but Mr. Nsanzuwera
6 went into hiding and he said so. He said that
7 he sought refuge at Hotel des Mille Collines
8 where he stayed until 28 May 1994.

9
10 Do not forget that he also had the duty to
11 requisition. He realized -- and I do not
12 reproach him for that -- Nsanzuwera realized
13 that it was better for him to go into hiding,
14 but I realize that he, like Kayishema, saw that
15 he could not do anything and that it was better
16 for him to save his life.

17
18 Your Honours, I think I accept this and I would
19 even add, because I'm very humble and modest, I
20 do not know whether I would seek to be a hero in
21 such circumstances. If I were in such
22 circumstances I am not sure that I would seek to
23 be a hero. If the courage that I was expected
24 to show was to lead me to suicide, then I think
25 I would reserve myself for other tasks, I

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1 think.

2

3 Therefore, Kayishema could not be reproached for
4 not having been a hero. He was powerless and I
5 think because he is powerless this should
6 discard any other argument. Under the
7 circumstances it is certain that all that I have
8 argued at this point is coherent and relevant
9 and reasonable and there is no doubt, no --
10 there is no doubt that should lead you to set
11 aside what Kayishema said because I'm convinced
12 that he is telling the truth.

13

14 We know that he came out of his hiding when on
15 the 20th, I believe, the new team of gendarmes
16 came to replace Jabo and his troops who left for
17 the front. When the situation calmed Kayishema
18 came out and met this lieutenant who was
19 called -- if I read my file well, the gendarme
20 was called Masengesho and the -- he told him, I
21 will take control of the situation and Kayishema
22 also went back to his duties. Masengesho, that
23 was the name of the lieutenant.

24 So he went with this gendarme to town to see the
25 tragic events and he explained to you the

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1 conditions under which the dead bodies had to be
2 cleared in order to enable his vehicle and the
3 gendarme vehicle to pass. He resumed his duties
4 as soon as this was possible.

5
6 I will conclude by saying that here I'm a legal
7 expert. I'm not a historian, a sociologist or
8 psychologist. I'm like you, a legal expert.
9 And I'm strongly requesting the prosecutor, who
10 has the burden, the onus of proof, to
11 demonstrate that all that I'm saying here is not
12 or was not reasonable.

13
14 It is for the prosecutor to say with proof that
15 there was no riot, that Jabo was all -- was
16 still there, that the gendarme called Masengesho
17 did not exist and that I did not resume my
18 duties.

19
20 It is for the prosecution because I'm presumed
21 innocent, for the prosecution -- it is for the
22 prosecution to prove that what I'm saying is not
23 true. The prosecution -- the prosecutor had the
24 possibility of consulting the official reports
25 to counter my explanations. It is, therefore,

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1 his responsibility that my arguments are not
2 relevant. I'm waiting for counterarguments.

3

4 I am sure that I am true and I know that I was
5 hiding until the contrary can be established and
6 I am supposed to be innocent. This is not a
7 matter of speculation. This is not an
8 invention. This is not any fabrication. I have
9 stated the facts with clarity, I have given you
10 the details of my alibi, and I will ask you to
11 take into consideration my alibi and to consider
12 it in the context of the law.

13

14 With your permission now, having finished with
15 the facts, I would go on to the law because I
16 still have one hour of work with you, one hour,
17 one hour and a half. I hope I will be able to
18 finish this evening. In any case, that is my
19 wish. I think this is wished by all of us. I
20 hope we will be able to finish today.

21

22 Mr. President, I will now address the indictment
23 against me. In other words, I will first talk
24 about genocide. Then I will talk about crimes
25 against humanity and then Article 3 common to

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1 the Geneva Conventions, the Protocol II, Article
2 6(3) and 6(1) and then I will conclude on -- I
3 will conclude my statement.

4
5 I will try to be very brief and as least
6 abstract as possible. I will be as concrete as
7 possible. In that case I will not go into all
8 the details which you understand probably better
9 than I do.

10
11 Genocide, as I recall, is Article 2 of the
12 statute, Article 2 which provides -- Article
13 2(2) provides that genocide, that genocide is
14 any of the following acts committed with the
15 intent to destroy in whole or in part a
16 national, ethnic, or religious group.

17
18 The prosecutor under this crime charges me with
19 the murder or killing of members of the group
20 which constitutes genocide, causing serious
21 bodily or mental harm to members of the group
22 and deliberately inflicting on the group
23 conditions of life calculated to bring about its
24 physical destruction in whole or in part.

25

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1 The prosecutor tells me that the group he has in
2 mind, the group which he describes as an ethnic
3 group -- this fortunately reduces the analysis
4 we have to make. Well, we are going to examine
5 this closely and, first of all, see what the
6 prosecutor is telling us in his written brief
7 and also in his oral arguments because the two
8 are not absolutely in agreement.

9
10 Orally he added a number of points. I will
11 immediately say, and this is an observation,
12 that what the prosecutor tells us in his
13 arguments is not entirely in agreement with what
14 he said in his indictment. The indictment did
15 not address (c) of Article 2(2), that is,
16 deliberately inflicting, et cetera. In the
17 course of his arguments he added -- may I
18 continue.

19 MR. PRESIDENT:

20 Yes.

21 MR. FERRAN:

22 The indictment did not address (c) of Article
23 2(2). Therefore, it is in the course of his
24 argument that the prosecutor thought it
25 appropriate to add this element and I will see

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1 what to do with it.

2

3 First of all, I will address his written
4 submissions, written submissions which are very
5 interesting but which raise a few problems,
6 accurate problems, written submissions
7 regarding, first of all, the killing of members
8 of the group. I would address (a), (b), and (c)
9 and I would try to be as clear as possible.

10

11 As concerns the killing of members of the group,
12 the prosecutor tells us the following. On Page
13 17, Page 17 of the indictment he tells us --

14 MR. PRESIDENT:

15 Of the indictment?

16 MR. FERRAN:

17 Yes, Page 17 of the indictment. Sorry. Of the
18 written submissions, of the written brief. The
19 indictment is sketchy, is incomplete so I do not
20 think it is a useful instrument for a debate of
21 the written brief.

22

23 Page 17 of the written brief the prosecutor
24 tells us that there is a difference between the
25 French and English versions of the statute with

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1 regard to the word killing.

2

3 The word killing, according to the prosecutor or
4 according to the definition accepted by Trial
5 Chamber I, the word killing in English means
6 meurtre in French, but also all that could be
7 related to meurtre in French, including
8 involuntary homicide.

9

10 The word killing, therefore, is a very broad
11 word, a blanket term, whereas the French version
12 which uses the word meurtre is limited because
13 in French law, in civil law meurtre is voluntary
14 homicide but this notion excludes involuntary
15 death or killing.

16

17 It is, therefore, important whether we are
18 playing with the English language -- it is
19 important to know whether we are playing with
20 the English language or the French language.

21

22 I, Kayishema, I am working with the statute, the
23 French version of the statute, and I'm arguing
24 that the word meurtre be accepted in the strict
25 meaning and not as the prosecutor is suggesting,

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1 that is, in its broad sense so as to include as
2 many acts as possible, many acts of homicide
3 under the word killing, even involuntary
4 homicide, and, therefore, I am appealing to you
5 to follow in the footsteps of the first Trial
6 Chamber and to decide, as was the case in the
7 Akayesu matter, to decide that the word meurtre
8 will not be the word killing. We will simply
9 agree, accept the restrictive meaning of
10 voluntary homicide.

11
12 The prosecutor still in his written brief tells
13 us that the acts of imprudence that were
14 perpetrated and that led to death should be
15 considered as cases of meurtre or killing and he
16 says -- I quote him -- that the term intentional
17 was defined in a way as to cover acts covered
18 through recklessness.

19
20 He tells us that mere negligence cannot
21 characterize voluntary homicide but reckless
22 acts which led to death should be considered as
23 acts of voluntary homicide.

24 What is he looking for, the prosecutor? The
25 prosecutor is trying to include in the concept

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1 of voluntary homicide the involuntary act which
2 is so serious, which arises from something
3 unacceptable, which arises from serious
4 recklessness or negligence which leads to
5 death. Such death should not be left out of the
6 debate. It should be included under meurtre.
7 Involuntary homicide where it arises from
8 recklessness amounts to murder and I say, no, it
9 is clear that voluntary homicide is not
10 involuntary homicide and if the legislator
11 wanted to separate the two it is because there
12 was no homicidal intention in the involuntary
13 act even if it results from serious negligence
14 or recklessness.

15
16 Your Honours, unless it is an extreme case the
17 prosecutor could demonstrate that for the case
18 in point deliberate or, rather, serious
19 negligence was deliberate because the author
20 knew that through such negligence death was
21 unavoidable.

22
23 There the ingredient of intent leads us to think
24 that perpetrator, the author chose to commit an
25 omission, chose to be reckless in order to cause

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1 death. If by thus extending serious negligence
2 you can --

3 THE INTERPRETER:

4 Sorry. If you could take that again. If
5 counsel could take that again.

6 MR. PRESIDENT:

7 Please go slowly. The interpreter missed it.
8 Can you go over it again.

9 MR. FERRAN:

10 I was saying that the involuntary act which
11 reflects serious negligence cannot, as the
12 prosecutor requests, when death arises therefrom
13 cannot be part of the -- cannot fall under
14 murder on the mere ground that the ingredient of
15 intent, the willingness to kill is not in
16 negligence and only in extreme cases where the
17 prosecutor can prove that the negligence, the
18 serious negligence or recklessness is, in fact,
19 a disguised manner to cause death, it is only in
20 such cases that it could be considered as
21 murder, but so long as that has not been proven,
22 so long as the prosecutor does not prove that
23 the negligence was a disguise to kill we cannot
24 include under murder this act even if, even if
25 it was serious recklessness that led to death.

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1
2 The prosecutor also tells us still in his
3 written submissions that voluntary homicide,
4 that is, deliberate causing of death, is not
5 limited to the commission of a positive act.
6 Voluntary omission intended to cause death or
7 which through negligence leads to death must,
8 according to the prosecutor, be considered
9 because it characterizes intentional murder.
10 This is on Pages 17 and 18, Paragraph 60. He
11 gives an example.

12
13 The example of a person detained, a prisoner,
14 who is allowed to die from starvation or a
15 person seriously ill who is allowed to die
16 without treatment, these are extreme examples.
17 In those examples if the prosecutor can prove
18 that we deliberately deprived somebody seriously
19 ill of the treatment he deserved so that the
20 person should die, then by failing to provide
21 treatment or because of that omission that would
22 be -- that would amount to the will to cause
23 death, but if the person who deprives someone of
24 food or treatment does not realize that the
25 person deprived of food or treatment is going to

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1 die, that person, of course, cannot be accused
2 of having had the will through deprivation of
3 treatment or food, cannot be accused of having
4 had the intent to kill. Therefore, the
5 ingredient of intent is not there and we
6 cannot -- unlike the prosecutor requests, we
7 cannot include this category of facts under
8 murder.

9
10 Therefore, we should be very cautious, your
11 Honours, especially as the prosecutor in his
12 written submissions has his own peculiar manner
13 of demonstrating or proving or illustrating his
14 point, illustrations that were not followed by
15 Trial Chamber I of the Tribunal.

16
17 The prosecutor thus writes on Page 18, Paragraph
18 61 -- I quote -- for the prosecutor the
19 prosecutor interpretation is that advanced by
20 the prosecutor. Of course, charity begins at
21 home since, according to the prosecutor, he is
22 right and if he is right the Tribunal should
23 tell him that he should -- right, I think this
24 is not serious and, of course, you would
25 certainly not accept the proposal submitted to

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1 you by the prosecutor on this point.

2

3 You would not accept it especially because
4 universal criminal law provides that the broad
5 interpretation of the law where it is favorable
6 to the accused is accepted but only in that
7 case. The principle of legality prohibits the
8 criminal judge to interpret criminal laws in an
9 extensive manner.

10

11 It is always necessary -- this is a universal
12 criminal law principle recognized by all courts
13 in modern countries, civilized countries. The
14 judge is compelled to interpret the laws
15 applying the strictest interpretation, an
16 interpretation which is less unfavorable, least
17 unfavorable to the accused.

18

19 Therefore, I believe that reflection, law, and
20 the jurisprudence of Trial Chamber I are
21 available to guide us that to the conclusion
22 that the prosecutor's suggestion cannot be
23 accepted.

24

25 Still with regard to the written submission,

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1 with regard to murder the prosecutor tells us,
2 first of all, that fatal wounds should be
3 considered under the category of murder. Why?
4 Fatal wounds, according to him, are serious
5 wounds which lead to death.

6
7 I think these should be included under the
8 concept of homicide on the sole ground that
9 nothing is provided for for these fatal wounds
10 on deadly assault. What is provided is, of
11 course, the fact of deliberately causing death
12 and the serious bodily harm.

13
14 It will be abnormal that we punish voluntary
15 homicide but we punish serious, the causing of
16 serious bodily harm and that we do not punish,
17 punish deadly assault, assault which led to
18 death even if it was not initially sought.
19 Since death is there, through a broad
20 interpretation of the concept of homicide we
21 should also include deadly assault in the
22 category of murder or under murder.

23
24 Two observations. The first is that the
25 prosecutor is mistaken on Pages 105 and 106 of

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1 his oral submissions. He is mistaken and he
2 said, I quote, "In national laws with regard to
3 deadly assault, the crime of deadly assault is a
4 criminal crime alongside assassination and
5 murder."

6
7 This is not correct. Deadly assault is not a
8 criminal crime of homicide. It is a criminal
9 offense. It is a criminal offense, particularly
10 under French law, which is called deliberate
11 assault and battery, assault and battery, but is
12 separate from homicide and the gradation of the
13 penalty is not the same.

14
15 In particular, for example, homicide is punished
16 with a penalty which would go up to life
17 imprisonment but deadly assault could never lead
18 to a life sentence because this is not provided
19 for. There is a maximum penalty which does not
20 exceed twenty years. So this is a technical
21 error which should be pointed out and I have
22 done so.

23
24 Second observation, second observation, still
25 with regard to the oral arguments of the

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1 prosecutor, the prosecutor tells us that a
2 number of conditions should be met and he tells
3 us in particular -- well, this is on page --
4 Page 109. He tells us -- or, rather, Page 113
5 the prosecutor tells us the following.

6
7 It will be incomprehensible that the act of
8 deadly assault, which are serious acts, which
9 should not be included under murder and the
10 prosecutor proposes that deadly assault should
11 be considered under Articles 2(2)(2) of the
12 statute. The request made by the prosecutor is
13 not serious and unfounded. I would ask the
14 judges to set it aside because all of this is
15 deliberate. The more we open up the crimes, the
16 more the prosecution feels comfortable to ask
17 for convictions that he wants to obtain.

18
19 Maybe I would move on to something else. It is
20 4:00 P.M. Maybe we take a break.

21 MR. PRESIDENT:

22 Yes. So you are through with genocide?

23 MR. FERRAN:

24 Not quite.

25 MR. PRESIDENT:

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1 Not quite. Sorry?

2 MR. FERRAN:

3 I think I have done the most difficult part.

4 The rest of it will go much faster.

5 MR. PRESIDENT:

6 Thank you. We will take a break and come back
7 at 4:30 to continue the oral presentation of the
8 argument by Mr. Ferran.

9

10 So until 4:30 the proceedings stand adjourned.

11 (Recess was taken at 1605.)

12 (Pages 89-130 reported by M. Young.)

13

14

15

16

17

18

19

20

21

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24

25

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KAYISHEMA/RUZINDANA

1 MR. PRESIDENT:

2 Yes, Mr. Ferran, will you please continue
3 your presentation? We were discussing
4 the crime of genocide.

5 MR. FERRAN:

6 Quite so, Mr. President. I think I have
7 already given the replies that I was due
8 to give the prosecutor. I would now want
9 to finish with 4(a) of 22 of the statute
10 that is killing, you say that there has
11 to be mens rea, namely the intent on the
12 part of the author, of the perpetrator,
13 to destroy all or part of the human --
14 members of the human group. Here we are
15 told that it is an ethnic group.
16 How did the prosecutor demonstrate that
17 the moral element of the offense was
18 present in the acts, that with which
19 Kayishema is charged?

20 The prosecutor gives us a certain number
21 of directions in reflection.

22 In the oral -- in the oral brief, in
23 particular, in the oral arguments, the
24 prosecutor says that she considers that
25 the specific moral element, the moral

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KAYISHEMA/RUZINDANA

1 element specific to the crime of genocide
2 is seen or is met in the fact that
3 national identity cards were issued in
4 those -- in those days and that they were
5 supposed to be used for the commission of
6 genocide. This is the position of the
7 prosecutor.

8 I answer as follows: I say that these
9 identity cards had been invented a long
10 time ago, during the colonial era, and
11 this card was maintained for various
12 reasons, for head counts and so on and so
13 forth, but not for the needs of the trial
14 in which we are involved here.

15 It was not for the benefit of Dr.
16 Kayishema. What we are talking about is
17 not the absolute mens rea, but the mens
18 rea that is attributable by the
19 prosecutor to -- attributed by the
20 prosecutor to Kayishema, this mens rea
21 does not exist and I do not see the nexus
22 between the identity card and my client
23 in regard to the matter before us.

24 The prosecutor also says that we find
25 this moral element in schools called

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KAYISHEMA/RUZINDANA

1 schools for the elite, which were
2 accessible only to Rwandese of Tutsi
3 ethnicity. Again, I do not see how we
4 can seriously accuse Dr. Kayishema of the
5 -- for the objective analysis of his
6 criminal intent. I do not see how we can
7 attribute this situation to Dr. Kayishema
8 because it existed since the colonial era
9 and has nothing to do with the debate
10 that we are involved in.
11 She also says that there was a pattern of
12 conduct, consistent pattern of conduct,
13 that is Rule 93, in other words so long
14 as they could not stop, so long as Tutsi
15 still existed, so long as the ethnic
16 group had not been wiped out.
17 I want to ask you the question, now, why
18 this preemptory assertion? How can we
19 say that this was the intention of Dr.
20 Kayishema?
21 The prosecutor just advances ideas
22 without demonstrating them.
23 I think that since it is -- the onus of
24 proof lies with the prosecutor, the
25 prosecutor has proven nothing at all, has

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KAYISHEMA/RUZINDANA

1 not proven the moral element of the
2 offense that is necessary in this contest
3 of genocide that we are talking about,
4 the prosecutor has not proven that my
5 client asserted or -- voluntarily -- that
6 he was ready to destroy part or all of
7 the Tutsi group by killing or by
8 genocide. And I want to add that the,
9 the guilt is personalized and the
10 sentence in (Unintelligible) after that.
11 I would like to say that the prosecutor
12 did not attempt to tell us how Kayishema,
13 in his consistent pattern of conduct in
14 his life, how this man, whom I told you
15 had Tutsi friends, that -- who studied
16 with Tutsi classmates, who had, who
17 maintained the best kind of relationship
18 with this ethnicity, I do not see how he
19 could have been a torturer. The
20 demonstration of the prosecutor on the
21 moral level of the wheel -- of the intent
22 to destroy, the demonstration by the
23 prosecutor is still to be done and I want
24 to end up by saying that nothing, once
25 again, says -- there is nothing about the

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KAYISHEMA/RUZINDANA

1 72 children that -- I mean it has already
2 been established, after getting the
3 various witnesses and the analysis of
4 their testimonies, that my client made it
5 possible for the, for these 72 children
6 to be saved from the Kibuye Church. So I
7 think that the prosecutor is still
8 talking theoretically and that murder, as
9 a vehicle of genocide, by application of
10 Article 22(a), can not be retained
11 against Dr. Kayishema as constituted by
12 -- as charged by the prosecutor.

13 Serious harm, this is small B, this is
14 the causing serious bodily harm or
15 serious harm.

16 Now, what should we understand by serious
17 harm?

18 The prosecutor tells us in the written
19 brief -- in her written brief, that the
20 word serious should be taken in its
21 liberal sense. In other words, for
22 instance, for the prosecutor, even a
23 wound that heals without any problem, at
24 all, leaving no scars, would not -- does
25 not prevent us from saying that it was

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1 serious and that it fits within the
2 category of causing serious bodily -- of
3 bodily harm to members of the Tutsi group
4 for the debate that we are carrying out.
5 Your Honours, I want -- I want to accept
6 everything that is proposed, but we are
7 legal practitioners. We are not here to
8 judge principals or to judge in an
9 esoteric matter, in a totally artificial
10 matter, hypothesis, you know theories, we
11 are here to judge a man and it behooves
12 us, deeply, it is an imperious task to
13 base ourselves on legal instruments by
14 which the -- which should be the
15 foundation of our reflection and it
16 should -- this should be the mold of our
17 reflection. Nothing is -- nothing is
18 offered us, tribunals across the world
19 tell us that in terms -- in matters of
20 wounds, there are certain obligatory
21 parameters.
22 In French talks -- French courts talk
23 about temporary incapacity, for instance,
24 assault and battery that result in
25 incapacity or inability to go to work for

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KAYISHEMA/RUZINDANA

1 eight days are simple matters that are
2 taken, that are simple offenses, the
3 maximum penalty for which one month of
4 imprisonment, and it hardly, it hardly
5 ever happens.
6 Beyond eight days we go onto the
7 correctional tribunal, which may go
8 beyond that.
9 What I want to say here -- what is that
10 the word serious should not be
11 interpreted lightly, how would I put it,
12 it should not be not be taken, we should
13 not interpret it anyhow. The prosecutor
14 should give the criterion which she is
15 using to guide our work.
16 And particularly you, your Honours, the
17 prosecutor should bring us victims, since
18 I am pursued for having caused serious
19 bodily harm to members of the Tutsi
20 group, people should be brought here.
21 She should bring us people with medical
22 certificates, with technical examinations
23 that allows, if the prosecutor does not
24 give us a parameter or a classification,
25 a way of, a manner of calculating and

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1 determining the seriousness, unless she
2 should provide the practical elements
3 that would allow you to determine whether
4 it is serious or not. Therefore, I
5 consider that there is no criterion for
6 the assessment of this seriousness that
7 has been offered. Nothing has been put
8 forth and you, in particular, your
9 Honours, there is no evidence, because we
10 are dealing here with a criminal matter,
11 there is no proof, whatsoever, of the
12 fact that the serious harm and the
13 meaning of article 2 that was serious
14 harm inflicted by my client. There is no
15 proof and, therefore, I ask you, purely
16 and simply, to note that the short coming
17 of the prosecutor in this regard doesn't
18 allow us to consider anything further
19 and, next, and insures that you cannot
20 hold Kayishema guilty of what has not
21 been demonstrated as attributable to him
22 by the prosecutor. And I would like to
23 mention, in passing, that rule 66 and 67,
24 as well as 68 -- or rather paragraph 66,
25 67 and 68 of the brief of the prosecutor,

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KAYISHEMA/RUZINDANA

1 you are going to read these three
2 passages.
3 Do not absolutely concern the discussion,
4 the prosecutor cannot come here and
5 theoretically illustrate what I want to
6 do -- because what should be done --
7 because I think this is a legal
8 obligation to demonstrate the culpability
9 of Clement Kayishema.

10 It is under these conditions that the
11 physical integrity of the group that
12 would -- of the group has been -- has not
13 been affected by my client.

14 Now, how about harm, mental harm?
15 The prosecutor says that we should
16 understand by mental harm, and, there
17 again, I would like to agree with the
18 prosecutor and further -- and supplement
19 what the prosecutor says, that we should
20 understand this to mean inflictions that
21 are made and qualified at page 20 to the
22 mental faculties of the individual, which
23 should not be either simple or
24 temporary.

25 I agree with this definition, but it

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1 seems to me to be incomplete and I would
2 like us, therefore, to add the
3 disturbances of the psyche, because when
4 we look at mental faculties does not say
5 everything. For there to be serious
6 mental harm the psyche should be
7 affected.

8 There again, the prosecutor does not give
9 any evidence. There is -- the prosecutor
10 does not tell you what Kayishema did,
11 personally, because we are not judging
12 genocide in the absolute condition. We
13 are judging a man who is said to be
14 guilty. I am not talking about genocide
15 here, I am saying that I'm defending a
16 client who is charged with having
17 committed the acts stipulated by the
18 articles that I have mentioned and I'm
19 saying proof should be given me if this
20 genocide took place, as the prosecutor
21 states in the indictment. I want her to
22 demonstrate that I participated, that I
23 was an active and criminal participator.
24 And the prosecutor does not bring any
25 proof. Who are the Tutsis, since it is

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1 the same ethnic group that was affected,
2 as you say. What Tutsi can you bring me
3 who can -- to demonstrate that there has
4 been serious mental harm caused on this
5 group. Mental harm, according to the
6 definition that you are giving, and, you
7 know, according to the supplement that I
8 have given, what medical certificates,
9 learned colleagues, how can we talk about
10 serious harm, theoretically, without
11 looking at the concrete, whereas it is
12 the concrete that will allow you to ask
13 for 16 life sentences?

14 I think you should give me the basic
15 elements, the material elements that
16 demonstrate this change, this alteration
17 demonstrating, your Honours, that it is
18 I, Kayishema, who is responsible for
19 these afflictions.

20 Thirdly, what I would have done is the
21 consequence that there should be a
22 nexus. In other words my actions should
23 be directly the cause of the change, of
24 the harm caused physically or mentally.
25 You have not demonstrated anything at all

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1 and I would conclude by saying that we're
2 beyond the material and the concrete,
3 imperatively -- you should imperatively
4 transcend the theoretical and go into the
5 practical and demonstrate to my judges
6 that through this infliction of harm on
7 the body, on the night, I, Kayishema,
8 wanted to destroy in whole or in part the
9 Tutsi group.

10 Ladies and gentlemen, how have you
11 demonstrated it? You have not given any
12 proof, whatsoever, so not only do you
13 have to devote yourselves to this task
14 but before you take any interest in me
15 you should, through concrete elements,
16 through your medical certificates,
17 demonstrate to the tribunal that the
18 inflexions, by themselves, that were
19 made on the mental integrity of the group
20 were designed to cause disappearance.
21 How can a psychological shock bring about
22 a disappearance of an individual? We
23 should not just make sentences, we should
24 not content ourselves with just
25 sentences. We are in the worst criminal

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1 commission possible. We are not talking
2 about the murder of a neighbor of one's
3 mistress. We are talking about the
4 murder or killing of an ethnic group, so
5 you have to demonstrate, therefore, that
6 the ethnic group in question, the Tutsi,
7 through the serious mental infliction of
8 harm on them, has -- was going to lead to
9 their -- to their disappearance, if they
10 have suffered such inflictions to lead --
11 that were meant to lead to their
12 disappearance you should demonstrate that
13 it was I, Kayishema, who imposed these
14 elements of seriousness, of decisiveness,
15 but you do not, my Lords. They do not
16 demonstrate anything. I am stupefied
17 that we come here and make judicial
18 literature very interesting to read. We
19 are here soldiers, soldiers before the
20 court require that the arms on either
21 side be arms that are equal, that you
22 should have something concrete to give to
23 the judges so that they should not be
24 mislead, so that they can base their
25 decisions there on.

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1 You have strictly done nothing. You have
2 demonstrated nothing, physically
3 nothing. You have demonstrated nothing
4 mentally, at the level of the real and
5 you have not demonstrated anything about
6 the moral element. I am saying, my
7 Lords, that you cannot say, since you are
8 not given any evidence, that Kayishema
9 was -- was responsible for the serious
10 harm on -- bodily and mental harm on the
11 Tutsi group.

12 The third point on genocide --

13 MR. PRESIDENT:

14 Please go on, first.

15 MR. FERRAN:

16 Thank you, Mr. President.

17 Last paragraph, article 22, small c, is
18 the intentional --

19 MR. PRESIDENT:

20 Before you move on, Judge Khan had a
21 question to ask in respect of article
22 2(b).

23 JUDGE KHAN:

24 Please don't mind my interruption. As I
25 was listening to your submissions I want

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1 to seek clarification on matter. With
2 regard to paragraph B of article 2, as
3 you're submitting.

4 Now, we know in some national
5 jurisdiction, in order to prove serious
6 bodily harm or in other words grievous
7 harm, medical evidence is a must, in
8 national jurisdiction.

9 Now, is it your contention that in this
10 international jurisdiction, as this
11 clause or paragraph states, there should
12 also be medical evidence produced to
13 establish serious bodily harm and serious
14 mental harm to the members of the group
15 here in national jurisdiction the number
16 of victims is small, very limited, it may
17 be one, it may be two or it may be a
18 dozen, but here there's large scale
19 people were affected.

20 So, what is your contention, if you
21 must?

22 MR. FERRAN:

23 Yes, your Honour, your question is of
24 great interest to me, of course, and I
25 thank you for following what I said.

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1 I'm going to answer with two points. The
2 first point is that before you, like
3 before all tribunals across the world,
4 the onus of proof is imposed, the
5 prosecutor who require -- who seeks 10
6 years imprisonment for somebody has to
7 demonstrate, because all our accused are
8 assumed to be innocent, has the onus of
9 proving, technically, and here,
10 medically, that there were serious, that
11 serious harm was -- bodily harm was
12 caused to the Tutsi.
13 We should have a minimum, of course, of
14 material.
15 Second point is that serious harm can
16 only be evaluated if you know -- if you
17 are told what it is.
18 Because it is you who will assess the
19 grievousness, because the statute does
20 not make any definition. That is why I
21 was talking about the scales or the
22 parameters that we have in France in our
23 country. But from that score you have to
24 ensure that the seriousness that you
25 determine should be sufficient to ensure

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1 that you are certain that these wounds
2 were going to or were intended to bring
3 about a disappearance of all or part of a
4 human community.

5 This is contrary to what is practiced in
6 our country before the tribunals. There
7 is the reinforced obligation of minimum
8 demonstration, because, your Honours, if
9 you want to sentence me you have to give
10 grounds for your sentencing.

11 How do you think that -- I don't want to
12 put myself in your shoes, but I just want
13 to think with you. How can you say that
14 Kayishema on this day, this place, this
15 time, committed serious harm if you do
16 not know what happened, if the prosecutor
17 does not say I am prosecuting Kayishema
18 because on the 17th of October, for
19 instance, at this place he did this or
20 that.

21 And, secondly, I demonstrate to you,
22 clinically, scientifically, that what he
23 did was serious, sufficiently grievous
24 for him to have inflicted harm on the
25 Tutsi group, harm to have led it to

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1 disappear in part and with the intent, by
2 the gravity of the wounds that he
3 inflicted, the criminal intent, the mens
4 rea through that means partially, of
5 course, the disappearance of the group.
6 All of these things have to be brought
7 before you and they have to build up in
8 the case file.
9 The prosecutor should give you a minimum
10 amount of material. I do not have to do
11 so. You don't have to do it yourself
12 either. I am presumed innocent, so I am
13 certain of myself. I am waiting for my
14 adversary to give this evidence so that I
15 can counter it or offer it to you
16 corrected by the mechanism of defence,
17 but you have nothing at all. I may say
18 that under the circumstance you are
19 asked, you are asked to consider theory
20 and to go from theory to 16 life
21 sentences. There is no way that you can
22 do this unless you, yourselves, have to
23 reconstruct the rungs of the ladder that
24 would lead you to this kind of
25 sentencing.

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1 I think you cannot otherwise -- you
2 cannot do so without violating the
3 presumption of innocence unless you do so
4 without wishing to do so.

5 That is why I said, your Honour, that one
6 of -- your question is, in fact, a crux
7 of one of the areas that we are
8 discussing. Have I answered you, your
9 Honour?

10 JUDGE KHAN:

11 Yes. To sum up, would I be correct if I
12 say that your submission is or your
13 contention is that for proving such
14 serious bodily harm what is necessary,
15 under national jurisdiction, say for
16 instance medical evidence, etc.
17 is equally necessary in the international
18 level, is it correct?

19 MR. FERRAN:

20 Quite so, my Lord, and I think that there
21 is even a further requirement on the
22 prosecutor at the international level to
23 bring, because of the gravity of the
24 offenses, because of the underlying
25 philosophy of this text, it is -- it

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1 behooves the prosecutor to equip you as
2 much as possible, to furnish you with as
3 much evidence as possible so that you can
4 send, make your sentencing based on
5 conflict free fact rather than simple
6 assertions. Your Honours, if there was
7 genocide that is something else. I am
8 not going to be sentenced because there
9 was genocide in Rwanda. I am going to be
10 convicted if, in one way or another, I
11 Kayishema, participated on this day or
12 this time in this or that commission of
13 genocide and my participation based on
14 the text in article two depends on the
15 conditions that we are talking about,
16 killing, serious harm, or inflicting
17 inhuman conditions. Therefore the
18 prosecution should personalize its
19 prosecution and it should not do what it
20 is doing, in a brilliant manner, no
21 doubt, but it's sort of historical
22 background of what happened in
23 (untelligible), in Rwanda through the eye
24 of the prosecution without any
25 deregulation with the accused. It is

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1 Kayishema who is being charged here.

2 Thank you, may I continue, Mr.

3 President?

4 MR. PRESIDENT:

5 You may continue with your submission.

6 MR. FERRAN:

7 Thank you, your Honours, I'm finished
8 with serious bodily harm and mental
9 harm. Now we'll go on quickly, because
10 what I'm going to say is based on the
11 same reasoning.

12 I'm now -- I will now move on to 22(c)
13 deliberately inflicting on the group
14 conditions of life calculated etcetera,
15 etcetera.

16 The examples given by the prosecutor, you
17 would read them in his written
18 submission, the examples given apparently
19 demonstrate the grounds, the
20 reasonableness of what I am arguing,
21 namely that one cannot reasonably convict
22 Kayishema for anything.

23 The examples given by Mr. Rahetlah, you
24 will find them on page, on page 20, I'm
25 following, you will see them on pages 20

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1 and 21. The examples he gives are the
2 example of the final solution, the
3 Eichmann case. He talks about
4 restrictions inflicted on the group in
5 order to destroy it in whole or in part.
6 We are told that all of this applies to
7 the Rwandan situation.
8 That will be brief. What is argued?
9 What are the reasons adduced by the
10 prosecutor?
11 The prosecutor tells us that you cause
12 these people to live in conditions which
13 were not normal. You caused them to be
14 afraid. You compelled them to move from
15 one part of the country to another to
16 seek refuge here and there and on page
17 22, in the final analysis, the prosecutor
18 tells us that these Tutsis were condemned
19 to die, the victims did not receive
20 minimum assistance, which should have
21 enabled them to live in more decent
22 conditions.
23 Decency, the decency of living
24 conditions, are not provided for in
25 article 22.

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1 I do not contest that the conditions were
2 poor, but the fact that these unfortunate
3 persons lived for a few days before being
4 killed, at least for some of them, when
5 they were put together in a church, this
6 certainly is not decent. But decency is
7 not what is intended by the drafter of
8 the law.

9 The conditions of existence are such that
10 should lead to the death of the group in
11 whole or in part, the Tutsi group that we
12 are discussing here.

13 Putting this question is answering it,
14 the fact that these people were deprived
15 and this is unfortunate and legal
16 practitioner, the fact that these people
17 did not have the water that they wanted
18 at the time they needed it, the fact that
19 they did not have food when they should
20 have needed it, the fact that they were
21 compelled to eat their cows raw, should
22 that, according to the drafter of article
23 2, should this have necessarily led to
24 the death of those unfortunate persons,
25 this treatment, in and of itself, did it

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1 constitute an attack on their living
2 conditions that should have led to their
3 death?

4 Certainly, no, therefore, under these
5 conditions you -- what you're saying is
6 inadmissible, because you are off the
7 mark, off the mark of what is required by
8 the law.

9 You can not, in any manner, whatsoever,
10 be followed and if the example of the
11 final solution that you are giving is
12 inappropriate. It is for two reasons.
13 First of all, because the unfortunate
14 Jews lived in concentration camps, they
15 died slowly, they were made to suffer
16 slowly until they died.

17 There were daily attacks, programmed
18 attacks on their physical integrity,
19 which was intended to lead to their death
20 because human resistance is not beyond,
21 this cannot go beyond this type of
22 treatment. Here this is not the case,
23 this is not the case because this lasted
24 for 2 or 3 days, therefore the time, the
25 time coefficient was not present, like in

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1 the concentration camps of the masses
2 where there was no food for several
3 months. This has nothing to do with the
4 present situation.
5 The second reason, the second reason for
6 which the prosecutor -- prosecutor's
7 arguments are unacceptable is that the
8 prosecutor states or argues the contrary
9 of what he states.
10 He pleads white and falls back on black.
11 What does he tell us?
12 He tells us that to better kill these
13 unfortunate people they were packed for
14 two or three days in the stadium. If you
15 tell me that this was to kill them and
16 not to cause bodily harm, fine.
17 According to your thesis that it was to
18 kill them, this was to kill them more
19 easily and quickly, consequently the time
20 factor, the factor of gravity, the factor
21 of deliberately inflicting conditions of
22 life calculated to bring about their
23 physical destruction is absent, therefore
24 you cannot, they cannot be convicted on
25 this ground.

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1 I would conclude on this point by stating
2 that the ingredient of intent is absent.
3 How can you, in your thesis, say that
4 these people were put in the church or
5 the stadium with the intention that the
6 treatment inflicted on them would kill
7 them at the end of 2 or 3 months, because
8 they would not have food.
9 You are saying that we put them there to
10 kill them violently with machetes and,
11 consequently, you, yourself, recognize
12 that the element of intent, the
13 determination to arrive at genocide was
14 not there.
15 You cannot want to kill people gradually
16 and at the same time want to kill them
17 rapidly. It's either one way or the
18 other. Consequently your argument,
19 still, from a legal point of view, I'm
20 not as a moralist or a historian, I'm a
21 jurist. I have the laws here with me.
22 I'm trying to interpret them in the
23 interest of my client, but, also, above
24 all, in the interest of truth. So -- in
25 the interest of truth. Under the

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1 circumstances, your Honours, I will ask
2 you to reject the claims made by the
3 prosecution regarding genocide. This
4 also is the end of my presentation on
5 this first part.

6 I will now move on to crimes against
7 humanity.

8 Crimes against humanity, these are under
9 article 3, article 3 which tells us the
10 following:

11 I am referring to this, for the record,
12 the International Tribunal for Rwanda
13 shall have the power to prosecute persons
14 responsible for the following crimes:
15 One committed as part of a widespread or
16 systematic attack against any civilian
17 population; as part of a widespread or
18 systematic attack and the prosecutor
19 brought charges of murder, extermination,
20 and other inhumane acts provided for
21 under article 3.

22 Now we will immediately examine these
23 crimes.

24 I think we'll be very brief, we'll be
25 brief because we are in the heart of

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1 concurrent or coincidence of offenses.

2 I think it's not necessary to push the
3 reflection very far because, as I wish,
4 there is one -- we will stop at one
5 evidence.

6 We cannot try somebody for the same act,
7 for the same crime, and convict him, if
8 he's found guilty, and convict him by
9 sentencing him on the crimes that are
10 differently characterized.

11 The tribunal, in trial chamber one, told
12 us a number of interesting things. The
13 tribunal, for example, told us that the
14 district court, the one which tried
15 Eichmann, the district court stated that
16 crimes against humanity, crimes against
17 humanity are different from genocide in
18 that genocide is characterized by a
19 special intent which is not required for
20 crimes against humanity.

21 What does this mean?

22 This means that for there to be genocide
23 the individual prosecuted must have
24 killed a category of people, people of
25 the same ethnic origin or group, that the

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1 people must have been killed because they
2 belong to the Tutsi group in our own
3 case.

4 On the contrary, crimes against humanity,
5 which provide, among other things,
6 extermination, murder and so on, crimes
7 against humanity do not meet or do not
8 require that proof be given that a
9 specific ethnic group was affected.
10 Genocide links the concept to a category,
11 religious, ethnic group, etcetera.
12 Crimes against humanity are a fatal
13 attack against a mass of people, a great
14 number of people, even if that number of
15 people or group of people did not have
16 specificity without any intent. This is
17 what trial chamber two stated in its
18 decision and this is what the prosecutor
19 also adopted.

20 The prosecutor states the following -- or
21 the prosecutor argued in his oral
22 statement on page 143 that, I am speaking
23 of extermination under crimes against
24 humanity. Extermination is a massive
25 form of voluntary homicide, like

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1 genocide, yes, in the two cases there are
2 two groups of people, but Mr. Rahetlah
3 tells us that it is different from
4 genocide, that is extermination for
5 crimes against humanity is different from
6 genocide by virtue of the fact that it
7 does not imply the idea of destroying a
8 given human group, as such.
9 And here lies the difference.
10 With your permission I will take an
11 example, I will give an example.
12 Suppose I participated in a large scale
13 killing of the Tutsi ethnic group. If I
14 have the intention of eliminating this
15 ethnic group the material fact and the
16 material element or requirements have
17 been met. I have committed genocide
18 according to article 2. I killed them
19 through murder.
20 Second assumption, suppose I'm a mental
21 patient and I launch a program of
22 extermination of a large number of
23 people, but people whom I choose by
24 chance in the streets, in the various
25 neighborhood, this is an extermination, a

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1 large scale extermination of people. I'm
2 killing people, but when I am arrested
3 and I'm asked why, I do not say that I do
4 not like them because I do not have any
5 specificity. Whereas in genocide the
6 perpetrator, if he's guilty and if he
7 wants to assert himself, he would say I
8 did not like the Tutsi.
9 It is therefore clear, the problem, your
10 Honours, is that murder, extermination,
11 etc., the modus operandi in one case like
12 in the other, since it is a physical
13 elimination of the individual which is
14 involved, is the same.
15 Extermination, for example, is applicable
16 in the two cases.
17 Now I'm telling the other party and also
18 to you, the judges, that you cannot
19 convict a citizen and here Kayishema,
20 both for genocide, extermination, massive
21 extermination of the Tutsi group, and, at
22 the same time, you cannot convict him for
23 crimes against humanity, against the same
24 ethnic group.
25 I did not choose a category of people

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1 without distinction. I am therefore the
2 perpetrator of genocide, which is
3 specific. I'm guilty if I have been
4 found guilty. I'm guilty of having
5 killed a large number of people called a
6 Tutsi.

7 You cannot, Mr. Prosecutor, prosecute me
8 for crimes against humanity except when
9 you prove that in addition to the
10 genocide that I committed I also killed a
11 large category of people which did not
12 belong to that ethnic group.

13 Because the Tutsis, if I killed them, I
14 killed them in the context of the
15 genocide, because they were Tutsi, not
16 because they were something else, since
17 they were not something else they were
18 Tutsi, therefore, consequently, if you
19 want to lead the tribunal to convict me
20 on the two crimes, crimes against
21 humanity and genocide, it is necessary
22 for you to prove to the judges that once
23 I had killed a Tutsi I also killed a mass
24 of people who were not Tutsi.

25 If not, if they are the same Tutsi, then

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1 that comes under genocide.
2 I think we should be serious and not
3 theoretically advance any kind of
4 argument. You are not given any
5 additional proof here, so I'm saying that
6 extermination, crimes against humanity,
7 cannot be accepted because I am
8 prosecuted for the genocide of Tutsi,
9 it's either one or the other.
10 I cannot similarly be convicted on the
11 other crimes, crimes against humanity
12 represented by the prosecutor as being
13 what I did, that is murder, and other
14 inhumane acts, because, for the same
15 reason, because I give the same reasons.
16 If I assassinate Tutsis simply because
17 I'm Hutu I am not assassinating someone
18 else. Assassination or murder is the
19 modus operandi of genocide. If you want
20 to convict me on murder and not the
21 murder of a Tutsi then you should prove
22 that I murdered other people in the
23 context of a great number of people and
24 this number of people constituting crimes
25 against humanity.

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1 You cannot go outside that reason or
2 reasoning.
3 You cannot, Mr. Prosecutor, I'm waiting
4 for your rebuttal. The two concepts
5 overlap.
6 There is a coincidence of offenses. You
7 want me to be convicted twice for the
8 same acts and for the same category of
9 people.
10 This is not possible. The interests are
11 different and you recognize that
12 yourself.
13 The Tutsi, if I kill them, if the
14 genocide took place, it is because I do
15 not want to accept that ethnic group,
16 according to your thesis, but nothing can
17 be brought against me concerning another
18 ethnic group. That is your thesis, Mr.
19 Rahetlah, so I think we should be
20 logical. You can not propose two
21 contradictory, two contradictory thesis.
22 You should choose. You should choose the
23 offense that you want me to be convicted
24 on, but you cannot have the judges to
25 convict me -- to convict me on crimes

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1 against humanity using the Tutsi ethnic
2 group and at the same time convict me on
3 genocide.

4 I have not done anything that enables you
5 to charge me with the two crimes at the
6 same time.

7 THE INTERPRETER:

8 If I killed the Tutsis -- could he take
9 that again, could he take the last part
10 again, we missed that and he could slow
11 down, please?

12 MR. PRESIDENT:

13 Repeat the last part of your, just ended
14 observation, if you may, and they also
15 request you slow down.

16 MR. FERRAN:

17 I'm sorry, Mr. President, I'm following
18 my reasoning. Maybe I was a bit too
19 fast, I regret.

20 It's very interesting. I am really
21 convinced of the reasonableness of what I
22 am pleading and this causes some
23 difficulties.

24 I was saying, Mr. President, in
25 conclusion, that the prosecution does not

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1 realize or does not want to see that it
2 is superimposing crimes, crimes that are
3 entirely similar, by putting or taking
4 genocide on the one hand and crimes
5 against humanity on the other.
6 I am prosecuted here because I am told
7 that I wanted to eliminate the ethnic
8 group in whole, Tutsi ethnic group in
9 whole or in part because they were Tutsi
10 on the base on murdering them, murdering
11 them on a large scale.
12 I have given explanations, but these
13 people who died were Tutsi and the
14 prosecution is telling me that it is
15 because they were Tutsi that genocide
16 took place.
17 The specific intent is the ethnic group.
18 Now we accept, but at the same time I
19 cannot be told that these people who are
20 Tutsi and who qualify your alleged crime
21 of genocide, because they are the Tutsi
22 ethnic group, now I used them again --
23 they are used again for me to be
24 convicted in crimes against humanity on
25 the grounds that these people were no

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1 longer Tutsi, they were something else,
2 because crimes against humanity,
3 extermination, targets a category of
4 people who do not have any label, who do
5 not have an ethnic group, they are
6 anonymous, they are people from my
7 neighborhood, or from the streets.
8 If they are Tutsi, and if they
9 constitute, legally, genocide, this
10 description cannot be taken away from
11 them. They cannot be made anonymous
12 victims of crimes against humanity
13 through extermination, this is not
14 possible.

15 And I'm telling the other party that you
16 can only convict me if you prove that I
17 am guilty of genocide, because I wanted
18 to cause the disappearance of the Tutsi
19 group and that, in addition to that, and
20 in addition to that, I killed many other
21 people who are not Tutsi, a considerable
22 number of people that could make one talk
23 of extermination and in that case we
24 agree, but this has not been proven.
25 Either these people are Tutsi and in that

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1 case there is genocide, or the people who
2 died were not Tutsi and in that case
3 we'll be dealing with crimes against
4 humanity, because they were killed on a
5 large scale.

6 Have I been clear enough?

7 MR. PRESIDENT:

8 Yes.

9 JUDGE KHAN:

10 But in the Akayesu case the different
11 view has been taken. I think you have
12 gone through that. They have said that
13 each crime consists of different elements
14 and they serve different purposes, made
15 different circumstances, that is the view
16 of chamber number one in the Akayesu
17 case. Now what are the elements?

18 MR. FERRAN:

19 Your Honour, I think trial chamber one is
20 mistaken. Trial chamber one made an
21 error. I think you cannot mix up
22 people. Trial chamber one, after having
23 given the definition of the two crimes,
24 the chamber did what the prosecutor was
25 asking for, this superimposition, which

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1 is not feasible. Trial chamber one is in
2 error. This chamber, after having said
3 that it was necessary for the same facts
4 to be qualified differently, after having
5 said that different interests had to be
6 created, the chamber did not go to the
7 end to prove that there were no different
8 interests. They are not different
9 interests, they are the same individuals,
10 the same children, the same men and
11 women. They are not Tutsi for genocide
12 and something else for crimes against
13 humanity.

14 There is no other interest.

15 These unfortunate people represented in
16 themselves, the definition given to
17 genocide, but that definition cannot be
18 destroyed so that the group is put in
19 another category of crimes.

20 I do not know whether I'm making myself
21 clear. I do not see any other definition
22 or argument. I think that chamber one
23 made an error, an error in law. We'll
24 see what the appeals chamber will say,
25 but I believe that the appeal is well

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1 grounded.

2 In any case, as far as I'm concerned, I
3 think we cannot go beyond this
4 observation. We should draw the
5 appropriate legal consequences, it's
6 either crimes of genocide or crimes
7 against humanity, because they are, in
8 this case, they are the same.
9 So, this is what I wanted to say on this
10 point. I have not yet finished. I still
11 have a few things to say, it is 5:30.

12 MR. PRESIDENT:

13 That's quite an interesting argument on
14 this one.
15 How far do you still have to go, Mr.
16 Ferran, to the end of your submission,
17 any idea?

18 MR. FERRAN:

19 I have an idea, but I do not want to
20 disappoint you. I thought I would finish
21 this morning. I was not able to finish,
22 maybe a couple of hours.

23 MR. PRESIDENT:

24 Now, we had intended, perhaps, that you
25 will take up some of the morning tomorrow

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1 but, unfortunately, there is an initial
2 appearance and the other courtroom, I'm
3 informed, is not functional, so there's
4 nothing to do about it, but before we
5 adjourn, you are saying that you have
6 some hours, so I should imagine that by
7 Monday morning you should be able to
8 complete. Mr. Rahetlah --

9 MR. FERRAN:

10 That is certain, it's certain that I will
11 finish on Monday.

12 MR. PRESIDENT:

13 Mr. Rahetlah, do you have any idea, under
14 Rule 86 of our rules, of course, the
15 prosecution have a right of rebuttal. Do
16 you intend to exercise that right and, if
17 so, do you have an idea of the amount of
18 time you will need?

19 MR. RAHETLAH:

20 Mr. President, as you're saying, these
21 closing arguments are very interesting,
22 of course the prosecutor is going to make
23 a rebuttal, now, how long will it take?
24 I think we will not need more than the
25 day of Monday, if Mr. Ferran finishes in

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1 two hours in the morning, I think that in
2 any event we will have finished by the
3 end of the afternoon session.

4 MR. PRESIDENT:

5 On Monday?

6 MR. RAHETLAH:

7 Monday.

8 MR. PRESIDENT:

9 Okay, and then of course the -- because I
10 think what we are in rebuttal we suppose
11 that you will be dealing with the issues
12 that have been raised by the other party,
13 not go over the other issues, that's what
14 we suppose, and in the event, of course,
15 I cannot ask the defence how much time
16 they may need if they choose to exercise
17 their right in a joinder maybe we shall
18 have to wait until we get there, so, but
19 we appreciate, we no doubt appreciate the
20 amount of work that has gone into this
21 thing from both sides and I'm sure it's
22 going to be very useful. But we hope,
23 so, all other things being equal, there's
24 a possibility of coming to an end, maybe,
25 by Tuesday or Wednesday perhaps. Would

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1 that be a reasonable program?

2 MR. FERRAN:

3 Yes, Mr. President. In any case while it
4 is true that I am available to you I
5 think I have to go back to France on
6 Tuesday, so I'm going to endeavor to be
7 as brief as possible, but sometimes I
8 have to be longer than I intend to be.

9 MR. PRESIDENT:

10 The program we are trying to work out is
11 to give an indication how we can conduct
12 our work, so on Monday see how we move
13 and let's try to see whether we can be
14 through by at least Wednesday, depending,
15 of course, how long the parties have
16 been, or Tuesday, we shall say we can
17 organize our work.

18 Okay, then, we will adjourn these
19 proceedings to Monday, Monday 9:30 in the
20 morning. So until Monday, 9:30 these
21 proceedings stand adjourned.

22 (Pages 131 through 173 by R. Lear)

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C E R T I F I C A T E

We, Melinda Walker, Sally Kohn, Marilyn Young & Rex Lear, Official Court Reporters for the International Criminal Tribunal for Rwanda, do hereby certify that we took the foregoing proceedings in the above-entitled cause and were recorded at the time and place as stated; that they were thereafter transcribed by computer under our supervision and control; that the foregoing pages contain a true and correct transcription of said proceedings to the best of my ability and understanding.

We further certify that we are not of counsel nor related to any of the parties to this cause and that we are in nowise interested in the result of said cause.

Melinda Walker

Marilyn Young

Sally Kohn

Rex Lear
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