

## CASE NOTE

### PROSECUTOR V MUSEMA\*

#### A COMMENTARY ON THE *MUSEMA* JUDGMENT RENDERED BY THE UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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##### I INTRODUCTION

On 27 January 2000, Trial Chamber I ('Chamber') of the International Criminal Tribunal for Rwanda ('ICTR')<sup>1</sup> rendered its 'Judgement and Sentence' in *Prosecutor v Musema* ('*Musema*').<sup>2</sup> Alfred Musema was found guilty of: genocide;<sup>3</sup> extermination constitutive of a crime against humanity;<sup>4</sup> and rape constitutive of a crime against humanity.<sup>5</sup> As punishment for these crimes, he was condemned to a single sentence of life imprisonment.<sup>6</sup>

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\* Case No ICTR-96-13-T (27 January 2000).

<sup>1</sup> The full name of the ICTR is the 'International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994': *Statute of the International Tribunal for Rwanda* ('*ICTR Statute*'), annex to SC Res 955, 49 UN SCOR (3453<sup>rd</sup> mtg), UN Doc S/Res/955 (1994); 33 ILM 1600 ('SC Res 955').

<sup>2</sup> 'Judgement and Sentence', *Prosecutor v Musema*, Case No ICTR-96-13-T (27 January 2000) (Aspegren J (Presiding) (Sweden), Kama J (Senegal) and Pillay J (South Africa)).

<sup>3</sup> *Ibid* [936].

<sup>4</sup> *Ibid* [951]. The applicable law of this offence is not considered in this case note.

<sup>5</sup> *Ibid* [967]. The applicable law of this offence is not considered in this case note.

<sup>6</sup> *Ibid* [1008].

The ICTR, which was established on 8 November 1994 by Resolution 955 of the United Nations Security Council,<sup>7</sup> is mandated to prosecute and try

persons responsible for serious violations of international criminal law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994.<sup>8</sup>

Despite its broad mandate, due to logistical and financial constraints, the ICTR to date has restricted prosecutions to those persons considered to have the highest levels of responsibility for the massacres which occurred in Rwanda.

From 1984 to 1994, Alfred Musema was the director of the Gisovu Tea Factory in the Rwandan Préfecture of Kibuye,<sup>9</sup> following appointment by Presidential decree.<sup>10</sup> Although a relatively new factory, by 1993 it was one of the more successful tea factories in Rwanda — its excellence being reflected in the London tea market.<sup>11</sup> In 1995, Alfred Musema was arrested in Switzerland. In 1996, he was charged by the Prosecutor for alleged violations of international criminal law on the premises of the Gisovu Tea Factory and in the surrounding hills.<sup>12</sup> The Prosecutor believed that Alfred Musema bore a high level of responsibility for these alleged violations, in part because his status as director of a successful tea factory in one of the poorest regions in Rwanda enabled him to exert substantial influence over the people he employed, and even over local authorities.<sup>13</sup> Moreover, according to the Prosecutor, Alfred Musema could not but have had strong links with the Government, even during the massacres. This is because tea was one of the main export earners in Rwanda, and the Gisovu Tea Factory was so economically successful.<sup>14</sup>

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<sup>7</sup> SC Res 955, above n 1. The *ICTR Statute* was subsequently modified by the Security Council on 30 April 1998, to establish a third Trial Chamber: SC Res 1165, 53 UN SCOR (3877<sup>th</sup> mtg), UN Doc S/Res/1165 (1998).

<sup>8</sup> *ICTR Statute*, above n 1, art 1.

<sup>9</sup> Kibuye is one of eleven territorial divisions of Rwanda: *Musema*, above n 2, [355].

<sup>10</sup> *Ibid* [12].

<sup>11</sup> *Ibid* [12]–[14].

<sup>12</sup> By the time of judgment, Alfred Musema had been charged with: genocide, or in the alternative, complicity in genocide; conspiracy to commit genocide; crimes against humanity (murder); crimes against humanity (extermination); crimes against humanity (other inhumane acts); crimes against humanity (rape); serious violations of article 3 common to the *Geneva Conventions* and of *Additional Protocol II*: ‘Amended Indictment’, *Prosecutor v Musema*, Case No ICTR-96-13-1 (6 May 1999).

<sup>13</sup> According to the expert witness of the Prosecutor, André Guichaoua, *Musema*, above n 2, [872].

<sup>14</sup> *Ibid* [868]–[878].

*Musema* was the fourth judgment completed by the ICTR after a trial on the merits.<sup>15</sup> Although subject to appeal,<sup>16</sup> it is nevertheless illustrative of several issues of importance to the development of international criminal justice. First, as a result of greater judicial control of proceedings, the trial proved to be more expeditious than the previous three, and could thus indicate a new trend at the ICTR. Second, the trial of Alfred Musema highlighted some of the challenges to be met in the application of a constantly evolving international criminal procedure, which must seek, in particular, to bridge fundamental differences between the various legal traditions of the world. Third, the judgment lays an important — yet questionable — precedent, with Alfred Musema being convicted not only under the principle of ‘direct’ individual criminal responsibility, but also as a ‘superior’<sup>17</sup> for acts committed by his subordinates. Finally, the judgment constitutes a landmark in the development of international criminal law, as it reiterates the jurisprudence concerning rape as an act of genocide, and also defines the elements of the offence of conspiracy to commit genocide.

## II THE TRIAL: TOWARDS MORE EFFICIENT PROCEEDINGS

Alfred Musema was arrested on 11 February 1995 at the request of a Swiss examining magistrate (*juge d’instruction*). He was then detained in Switzerland while the Swiss authorities investigated his possible unlawful conduct during the massacres in Rwanda in 1994. Following an application by the Prosecutor,<sup>18</sup> on 12 March 1996 the Chamber formally requested the Swiss Federal Government to defer the case of Alfred Musema to the ICTR.<sup>19</sup> On 15 July 1996, Judge Yakov Ostrovsky confirmed the initial indictment presented by the Prosecutor

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<sup>15</sup> The three judgments previously rendered on the merits were: ‘Judgement’, *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 September 1998); 37 ILM 1399 (*‘Akayesu’*); ‘Judgement and Sentence’, *Prosecutor v Kayishema & Ruzindana*, Case No ICTR-95-1-T (21 May 1999); and ‘Judgement and Sentence’, *Prosecutor v Rutaganda*, Case No ICTR-96-3-T (6 December 1999); 39 ILM 557. The ICTR also rendered three sentencing judgments after guilty pleas: ‘Judgement and Sentence’, *Prosecutor v Kambanda*, Case No ICTR 97-23-S (4 September 1998); ‘Sentence’, *Prosecutor v Serushago*, Case No ICTR 98-39-S (5 February 1999); and ‘Judgement and Sentence’, *Prosecutor v Ruggiu*, Case No ICTR-97-32-I (1 June 2000).

<sup>16</sup> The Appeals Chamber is common to both the ICTR and the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’).

<sup>17</sup> *ICTR Statute*, above n 1, art 6(3). This concept is addressed in detail at Part IV.

<sup>18</sup> ‘Application for a Formal Request for Deferral by Switzerland Concerning Musema Alfred’, *Prosecutor v Musema*, Case No ICTR-96-5-D (4 March 1996); *Musema*, above n 2, pt 2 (‘Proceedings’) fn 1.

<sup>19</sup> ‘Decision on the Formal Request for Deferral Presented by the Prosecutor’, *Prosecutor v Musema*, Case No ICTR-96-5-D (12 March 1996). The Swiss Federal Government was formally requested to defer all investigations and criminal proceedings being conducted in its national courts against Alfred Musema, and to continue to detain Alfred Musema until a warrant of arrest was issued against him by the ICTR; *Musema*, above n 2, pt 2 (‘Proceedings’) fn 2.

against Alfred Musema<sup>20</sup> and issued a warrant of arrest and order for surrender addressed to the Swiss authorities.<sup>21</sup> On 20 May 1997, nearly a year later,<sup>22</sup> Alfred Musema was transferred to the ICTR detention facilities in Arusha, Tanzania.<sup>23</sup> On 18 November 1997, during his initial appearance before the Chamber, Alfred Musema pleaded not guilty to all counts in the indictment.<sup>24</sup> His Swiss defence counsel — who failed to appear despite having been warned previously by the Chamber as a result of two earlier non-appearances — was replaced by the Chamber with Steven Kay.<sup>25</sup> On 18 November 1998, the Prosecutor was granted leave to amend the indictment to add the charge of complicity to commit genocide and, to each count, the allegation of superior responsibility under article 6(3) of the *ICTR Statute*.<sup>26</sup>

The trial on the merits of Alfred Musema began on 25 January and closed on 28 June 1999.<sup>27</sup> The Prosecutor called 22 protected witnesses, one investigator and one expert witness, while the Defence called the accused, four witnesses (two of whom were protected) and one investigator.<sup>28</sup> The trial of Alfred Musema was the shortest to date before the ICTR, lasting a total of 39 trial

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<sup>20</sup> ‘Decision on the Review of the Indictment’, *Prosecutor v Musema*, Case No ICTR-96-13-I (15 July 1996). The initial indictment against Alfred Musema was submitted by the Prosecutor on 11 July 1996. See also ‘Amended Indictment’, above n 12.

<sup>21</sup> ‘Warrant of Arrest’, ‘Order for Surrender’, *Prosecutor v Musema*, Case No ICTR-96-13-I (15 July 1996); *Musema*, above n 2, pt 2 (‘Proceedings’) fn 4.

<sup>22</sup> During which period Alfred Musema sought relief before the Swiss courts against the ICTR deferral request.

<sup>23</sup> Detention at the United Nations Detention Facilities of the ICTR is covered by the *Provisional Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal* (adopted on 9 January 1996) UN Doc ICTR/2/L.3.

<sup>24</sup> *Musema*, above n 2, [21].

<sup>25</sup> The Chamber issued a ‘Warning and Notice to Counsel in Terms of Rule 46(A) of the Rules of Procedure and Evidence’, *Prosecutor v Musema*, Case No ICTR-96-13-I (31 October 1997), for not appearing at the initial appearances scheduled for 16 June and 3 September 1997. A further failure to appear at the initial appearance of 18 November 1997 led the Chamber to withdraw the counsel in its ‘Decision to Withdraw Counsel and to Allow the Prosecutor to Redact Identifying Information of her Witnesses’, *Prosecutor v Musema*, Case No ICTR-96-13-I (18 November 1997). Alfred Musema entered pleas of not guilty to the charges in the absence of legal representation, after having been informed by the Chamber that in so doing he was not being deprived of his right to counsel and that were he not to plead, the Chamber would enter a plea of not guilty on his behalf. Steven Kay was assisted during trial by Michail Wladimiroff — both of whom had defended Dusko Tadic, the first accused to be tried by the ICTY: *Prosecutor v Tadic*, Case No IT-94-1-T (7 May 1997); 36 ILM 913.

<sup>26</sup> ‘Decision on the Prosecutor’s Request for Leave to Amend the Indictment’, *Prosecutor v Musema*, Case No ICTR-96-13-T (18 November 1998); ‘Amended Indictment’, above n 12.

<sup>27</sup> During the trial, the Prosecutor, as a consequence of testimony presented by prosecution witnesses, was granted leave to amend the indictment by adding the count of crimes against humanity (rape): ‘Decision on the Prosecutor’s Request for Leave to Amend the Indictment’, *Prosecutor v Musema*, Case No ICTR-96-13-T (6 May 1999); *Musema*, above n 2, pt 2 (‘Proceedings’) fn 12.

<sup>28</sup> *Musema*, above n 2, [29].

days.<sup>29</sup> This brevity was a result of amendments to the ICTR *Rules of Procedure and Evidence* adopted to render the proceedings more efficient.<sup>30</sup> It was also a result of the personality of presiding Judge Lennart Aspegren, who did not relent in ensuring that the proceedings were conducted with full efficiency, both during the hearings and informally with the parties.

Regarding the 1998 amendments to the *Rules of Procedure and Evidence*, noteworthy of mention are rules 73 bis and 73 ter.<sup>31</sup> Both rules are aimed at granting more power to the judges over the extent and nature of evidence to be presented during trial through formal conferences with the parties. These rules provide that during formal conferences with the parties, the Chamber or a judge designated from amongst its members may request, inter alia, the filing of lists of witnesses to be called by the parties with a summary of their intended testimony and its length, and a statement of uncontested facts. Following the submission of these documents, the Chamber or the judge may direct the submitting party to shorten the examination-in-chief of witnesses or to reduce the number of witnesses if it is deemed that an excessive number of witnesses are being called to prove the same point. The list of witnesses agreed upon is considered final, although the parties may at a later stage request the Chamber for leave to call additional witnesses, if it is in the interests of justice.<sup>32</sup>

*Musema* was the first ICTR trial in which rule 73 bis was applied. As a result, it proved to be a better structured trial than earlier trials before the ICTR, and allowed for efficient planning of the proceedings by the presiding judge.<sup>33</sup> In this case, unlike previous trials, discretion lay with both the Chamber and the Prosecutor, not just the Prosecutor, in deciding when and in which order witnesses were to be called. Consequently, the image of the judges as merely recipients of evidence was replaced by one of 'judicial activism', reflecting more closely the civil law method of conducting trials.

*Musema* therefore represents an important step in the right direction for international criminal jurisdictions, which must face challenges unlike those experienced by national jurisdictions — having to deal not only with complex

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<sup>29</sup> ICTR, *Tea Factory Director Convicted of Genocide*, Press Release, ICTR/INFO9-2-218EN (27 January 2000) 1. The Chamber was simultaneously conducting the trial of 'Judgement and Sentence', *Prosecutor v Rutaganda*, above n 15.

<sup>30</sup> These amendments were adopted during the 1998 ICTR Plenary session. Judges may, by either written procedure or at a plenary meeting, adopt amendments to the *Rules of Procedure and Evidence*: r 6, *Rules of Procedure and Evidence* (adopted on 5 July 1996 and subsequently amended) UN Doc ICTR/TCIR/2/L.2 ('*Rules of Procedure and Evidence*').

<sup>31</sup> Under r 73 bis, '[t]he Trial Chamber shall hold a Pre-Trial Conference prior to the commencement of trial'. Under r 73 ter, the Trial Chamber may hold a conference prior to the commencement of the defence case: *Rules of Procedure and Evidence*, above n 30.

<sup>32</sup> During the proceedings in *Musema*, both the Defence and the Prosecutor were granted leave to call additional witnesses: 'Decision on the Prosecutor's Request for Leave to Call Six New Witnesses', *Prosecutor v Musema*, Case No ICTR-96-13-T (20 April 1999); 'Decision on the Motion of the Defence for Two Additional Witnesses and Witness Protection', *Prosecutor v Musema*, Case No ICTR-96-13-T (6 May 1999); *Musema*, above n 2, pt 2 ('Proceedings') fn 13.

<sup>33</sup> Personal observations of the authors.

investigations, but also with tracking down witnesses exiled in countless countries. As such, *Musema* is a positive response to criticism that the rendering of international justice can only ever be a slow process.

### III ISSUES OF INTERNATIONAL CRIMINAL PROCEDURE

International criminal procedure, ever since its early development by the International Military Tribunals of Nuremberg<sup>34</sup> and Tokyo,<sup>35</sup> has brought to the fore numerous questions of comparative law and raised fundamental questions as to the compatibility of various legal traditions, in particular with respect to criminal justice principles. The trial of Alfred Musema once again demonstrated that establishing international criminal procedure is an ongoing process which evolves heuristically. The bench in this trial combined judges from different legal traditions: a 'hybrid' civil law from Sweden; civil law from Senegal; and common law from South Africa. It was faced with a common law inspired prosecution (Uganda, Nigeria, England and Tanzania), and a mixed defence (England and The Netherlands), whilst Alfred Musema was more familiar with the civil law inspired Rwandan system.<sup>36</sup>

Rule 89 of the *Rules of Procedure and Evidence*, possibly in anticipation of such mixed origins, provides that the Chamber shall not be bound by national rules of evidence.<sup>37</sup> Consequently, where the *Rules of Procedure and Evidence* are silent, the Chamber shall apply those rules of evidence which in its view best favour a fair determination of the matter before it, and which are consonant with the spirit and general principles of law.<sup>38</sup> Particular attention should be paid to the Chamber's discussion in *Musema* on the admissibility and worth of judicial documents compiled during the investigations and interviews carried out by the Swiss authorities ('Swiss Files').<sup>39</sup> Further, possibly reflecting differing legal traditions, the Chamber was divided as to the alibi defence.<sup>40</sup>

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<sup>34</sup> *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 58 Stat 1544, 82 UNTS 280.

<sup>35</sup> *Charter of the International Military Tribunal for the Far East*, 19 January 1946, reprinted in United States Department of State, *A Decade of American Foreign Policy: Basic Documents* (1950).

<sup>36</sup> ICTR, *Tea Factory Director Convicted of Genocide*, above n 29.

<sup>37</sup> *Rules of Procedure and Evidence*, above n 30, r 89.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Musema*, above n 2, [91].

<sup>40</sup> The majority accepted the alibi defence in relation to three incidents out of the nine considered. Aspegren J disagreed with the majority in relation to three other incidents, for which he accepted the defence. Pillay J disagreed with the majority in relation to the three incidents, rejecting the defence in relation to all incidents.

A *The Swiss Files*

The Swiss Files were composed of transcripts of interviews of Alfred Musema recorded by a Swiss examining magistrate, and of a number of other documents gathered during the investigations by the Swiss authorities.<sup>41</sup> These files, having been transmitted to the Prosecutor following the request for deferral,<sup>42</sup> were with the consent of the defence submitted as evidence during the trial and were extensively utilised during the examination-in-chief and cross-examination of Alfred Musema.<sup>43</sup>

It would appear, upon initial observation, that the Chamber, in deciding upon the evidential worth of these documents, drew inspiration from the common law tradition. The Chamber stated the general evidentiary principles relating to oral testimony at length: admissibility, assessment of probative value, authenticity and corroboration of documentary evidence. However, the Chamber did not go so far as to state that it was bound by these general principles, indicating rather that it had relied on them and had taken into account the circumstances and conditions in which the documents were produced.<sup>44</sup> It also noted that ‘judicial testimonies’ — obviously referring to the Swiss Files put together under the Swiss civil law tradition — tended to demonstrate greater reliability than ‘non-judicial testimonies’.<sup>45</sup> The Chamber placed emphasis on rules 42 and 43 of the *Rules of Procedure and Evidence*,<sup>46</sup> which set the procedures to be respected by the Prosecutor, and which read in conjunction with rules 39 and 95,<sup>47</sup> were seen to provide the yardstick against which the Chamber was able to measure both the admissibility and probative value of pre-trial interviews such as those contained in the Swiss Files.<sup>48</sup> Although the Chamber ultimately relied on an interpretation of a number of its own *Rules of Procedure and Evidence*, its approach was symbiotic, with substantial weight being given to both common law evidentiary principles and to civil law rules governing the taking of judicial interviews.<sup>49</sup>

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<sup>41</sup> In civil law systems, criminal investigations, including interviewing of suspects, are directed by an examining magistrate who makes an initial judicial assessment of the evidence gathered. The investigations are governed by strict procedural and legal requirements as laid down in criminal procedure codes.

<sup>42</sup> ‘Decision on the Formal Request for Deferral Presented by the Prosecutor’, above n 19.

<sup>43</sup> *Musema*, above n 2, [91].

<sup>44</sup> *Ibid* [92].

<sup>45</sup> *Ibid* [94].

<sup>46</sup> Rule 42 relates to ‘Rights of Suspects During Investigations’ and r 43 to ‘Recording Questioning of Suspects’: *Rules of Procedure and Evidence*, above n 30.

<sup>47</sup> Rule 39 relates to ‘Conduct of Investigations’ and r 95 to ‘Exclusion of Evidence on the Grounds of the Means by Which it was Obtained’: *Rules of Procedure and Evidence*, above n 30.

<sup>48</sup> *Rules of Procedure and Evidence*, above n 30.

<sup>49</sup> *Musema*, above n 2, [53]–[97].

B *The Alibi Defence*

Alfred Musema's defence was one of alibi. The Chamber was divided, with Pillay J attaching a 'Separate Opinion' on the issue of how to appraise a defence of alibi.<sup>50</sup> Alfred Musema's alibi spanned more than three months from 6 April 1994 to mid-July 1994. It was divided into six periods during which he submitted that he had travelled extensively throughout Rwanda and into Zaïre (now Democratic Republic of Congo).<sup>51</sup> In addition to testimony from the accused and other witnesses, over 100 documents were tendered by the Defence as evidence.<sup>52</sup>

The majority, Aspegren and Kama JJ, both stemming from civil law systems in which the defence of alibi is not conferred a special status, favoured a piecemeal approach: assessing in chronological order each separate event and the alibi for the relevant period.<sup>53</sup> Thus, during the trial they first considered the evidence the Prosecutor presented to establish, for example, alleged killings at the Gisovu Tea Factory, and where there was a case to answer they would then consider the alibi for the relevant period to see whether it created doubt.<sup>54</sup> However, where the alibi was rejected, this only affected the alibi in so far as it concerned the period in issue and not the alibi as a whole. For instance, in the Judgment, Alfred Musema was found to have participated in massacres occurring around mid-May 1994 on the basis of prosecution evidence, so the alibi for that period was subsequently rejected.<sup>55</sup> However, the alibi for 5 June 1994 was held to cast a reasonable doubt on Alfred Musema's alleged participation in an attack on that day.<sup>56</sup>

By contrast, Pillay J in her Separate Opinion 'assessed the evidence of alibi presented at trial as a whole, rather than on a piecemeal, or day by day basis'<sup>57</sup> and stated 'that once the credibility of a witness has been impaired, the testimony of that witness is inherently unreliable in all of its parts, unless it is independently corroborated'.<sup>58</sup> After a summary review of key documentary evidence and oral testimony presented by the Defence, in particular Alfred Musema's own testimony, Pillay J highlighted those issues she deemed to

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<sup>50</sup> *Musema*, above n 2 (Pillay J).

<sup>51</sup> *Musema*, above n 2, [317].

<sup>52</sup> Particular mention should be made of exhibit P68, being a calendar for this three month period that Alfred Musema drew up whilst detained in Switzerland, and exhibit D10, known as the '*Ordre de Mission*' on which there appeared numerous stampings and signatures said to support Alfred Musema's alibi. Both exhibits are annexed to *Musema*, above n 2.

<sup>53</sup> *Musema*, above n 2, [649].

<sup>54</sup> *Ibid* [649].

<sup>55</sup> *Ibid* [694]–[757].

<sup>56</sup> *Ibid* [785]–[789].

<sup>57</sup> *Musema*, above n 2, [3].

<sup>58</sup> *Ibid* [4].

present inconsistencies. On these grounds she rejected Alfred Musema's testimony as inherently unreliable in its entirety.<sup>59</sup>

The judicial assessment of the alibi defence is a fundamental issue. This split decision, apparently based on differing legal traditions, highlights the intrinsic difficulties faced by practitioners and adjudicators searching for juridical consistency in the field of international criminal law.

#### IV INDIVIDUAL CRIMINAL RESPONSIBILITY AS A SUPERIOR

The Prosecutor alleged that for each count in the indictment Alfred Musema was individually criminally responsible not only under article 6(1), but also responsible as a 'superior' under article 6(3) of the *ICTR Statute*.<sup>60</sup> Article 6(1) lists five forms of participation — planning, instigating, ordering, committing or aiding and abetting — by which an accused can be held individually criminally responsible for a crime falling under the jurisdiction of the ICTR. Moreover, article 6(3) provides:

The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>61</sup>

Under article 6(3) accused persons can be held criminally responsible as a 'superior' for their failure to act. This is to prevent the perpetration of a crime by their subordinate or to fail to punish them for that crime.<sup>62</sup> Superior responsibility therefore derives from the failure of the superior to honour an obligation.<sup>63</sup>

When addressing the issue of whether superior responsibility, or 'command responsibility' as it is referred to in *Musema*, applies to both military personnel and civilians, the Chamber recalled the findings of the Tokyo Tribunal. In that instance, Hirota, a former Foreign Minister of Japan and a civilian authority, was

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<sup>59</sup> Ibid [30]. As a consequence, Pillay J found that the evidence established, contrary to the majority, that Alfred Musema instigated rape through suggestions he made at a meeting on Karongi Hill: at [5]–[12].

<sup>60</sup> *ICTR Statute*, above n 1.

<sup>61</sup> A similar provision is included in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827, 48 UN SCOR (3217<sup>th</sup> mtg), UN Doc S/Res/827 (1993); 32 ILM 1203, art 7(3).

<sup>62</sup> As stated by the International Law Commission: 'an individual incurs criminal responsibility for the failure to act only when there is a legal obligation to act': International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, A/CN.4/Ser. A/1996/Add.1 (Part 2), 51 UN GAOR (1996), UN Doc A/51/10 (1996), art 6.

<sup>63</sup> On the legal nature of the doctrine of superior responsibility, see, eg, Ilias Bantekas, 'The Contemporary Law of Superior Responsibility' (1999) 93 *American Journal of International Law* 573.

convicted of war crimes as a superior.<sup>64</sup> The Chamber in *Musema* also took note of the dissenting opinion of Röling J in the Tokyo Tribunal findings, who considered that command responsibility should only be recognised in a very restricted sense.<sup>65</sup> It adopted a pragmatic approach and declared that:

[I]t is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration. Therefore the superior's actual or formal power of control over his subordinates remains a determining factor in charging civilians with superior responsibility.<sup>66</sup>

The Chamber concluded that the fundamental issue to be determined is the extent to which the superior, in the present case Alfred Musema, exercised *de jure* or *de facto* power over the actions of his subordinates.<sup>67</sup> In so doing, the interpretation of the Chamber is akin to the conclusion of the International Law Commission, according to which 'the reference to "superiors" is sufficiently broad to cover military commanders or other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates.'<sup>68</sup> The Chamber further noted that:

The influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure. This is particularly relevant to the case at bar, in so far as Alfred Musema was a socially and politically prominent person in Gisovu *Commune*.<sup>69</sup>

On the basis of witnesses' testimonies and the documents presented during trial, the Chamber found that Alfred Musema had 'legal and financial control over [his] employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory.'<sup>70</sup> The Chamber also found that he

was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the

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<sup>64</sup> Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R John Pritchard and Sonia Zaide (eds), *The Tokyo War Crimes Trials* (1981) vol 20, 49,791; see discussion in *Musema*, above n 2, [133].

<sup>65</sup> *Musema*, above n 2, [134].

<sup>66</sup> *Ibid* [135].

<sup>67</sup> *Ibid* [148]. The Chamber also found that: 'a civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law': at [141].

<sup>68</sup> International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, above n 62, art 6, as quoted in 'Judgement', *Prosecutor v Aleksovski*, Case No IT-95-14/1-T (25 June 1999) [75].

<sup>69</sup> *Musema*, above n 2, [140].

<sup>70</sup> *Ibid* [880].

Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute.<sup>71</sup>

The Chamber also found that Alfred Musema was 'in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes',<sup>72</sup> and concluded that Alfred Musema exercised de jure power and de facto control over the employees and the resources of the Gisovu Tea Factory.<sup>73</sup> It therefore found that there existed a de jure superior-subordinate relationship.<sup>74</sup>

With the questions pertaining to the applicability to Alfred Musema of superior responsibility resolved, the Chamber put forward a test for determining whether he should be held criminally responsible under article 6(3) of the *ICTR Statute*. It found that, once it has been determined that an accused was in the position of a superior, three issues must then be concurrently established. First, that one of the acts referred to under articles 2–4 of the *ICTR Statute* was indeed committed by a subordinate of the accused. Second, that the accused knew or had reason to know that the subordinate was about to commit such act or had done so. Third, that the accused failed to take the necessary and reasonable measures to prevent the commission of this act by the subordinate or to punish them for the criminal conduct.<sup>75</sup>

When applying the first part of this test to the facts of the case, the Chamber appeared not to expect a strict requirement of proof of the commission of specific acts referred to under articles 2 to 4 of the *ICTR Statute* by subordinates of the accused.<sup>76</sup> In other words, there was no clear necessity for the prosecution

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid [882]. The Chamber found that the Prosecutor had failed to establish that Alfred Musema exercised de jure power and de facto control over the population of Kibuye Préfecture, although it noted that Alfred Musema was perceived as a figure of authority and as someone who wielded considerable power in the region: at [881]. It should be noted that the Prosecutor did not clearly allege in the indictment against Alfred Musema whether he was individually criminally responsible as a superior only for those acts committed by his employees, or whether he should also be held liable for acts committed by others during the massacres at which he was present. During the trial, the Prosecutor submitted that, as Alfred Musema was a local authority in Kibuye Préfecture, he should also be held individually criminally responsible under art 6(3) of the *ICTR Statute* for the acts committed by members of the population of Kibuye Préfecture, including gendarmes, who participated in the massacres: at [892].

<sup>75</sup> Ibid [892]. This test is very similar to the one provided by the ICTY Trial Chamber in *Prosecutor v Aleksovski*, above n 68, [69]:

[S]uperior responsibility may be invoked if three concurrent elements are proved: (i) a superior-subordinate relationship between the person against whom the claim is directed and the perpetrators of the offence; (ii) the superior knew or had reason to know that a crime was about to be committed or had been committed; (iii) the superior did not take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.

<sup>76</sup> *Musema*, above n 2, [893].

to identify the specific acts committed by the subordinates, such as an alleged murder or alleged acts of torture, and only general information was provided as to the place and time that the culpable acts were said to have been perpetrated. Instead, the participation of Alfred Musema's employees in massacres was deduced by the Chamber from their established presence among the attackers.<sup>77</sup> Thus, on the basis of the evidence presented, the Chamber 'noted that employees of the Gisovu Tea Factory were among the attackers' during the attacks on Gitwa Hill,<sup>78</sup> Rwirambo Hill,<sup>79</sup> Muyira Hill,<sup>80</sup> and in Mumataba.<sup>81</sup> For each of these massacres, the Chamber made a similar finding: namely, that the participation of the employees of the Gisovu Tea Factory 'resulted, inevitably, in the commission of acts referred to under articles 2 to 4 of the ICTR Statute.'<sup>82</sup>

When evaluating the second and third requirements of the above-mentioned test, the Chamber again proceeded by deduction. According to the Chamber, because Alfred Musema was present at the sites of these attacks, 'he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so.'<sup>83</sup> For each massacre, the Chamber found 'that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.'<sup>84</sup>

It would appear, therefore, that the findings in *Musema* pertaining to superior responsibility are based more on deductions from the general context of the perpetration of massacres rather than on a finding beyond reasonable doubt that specific acts were actually committed by the subordinates of the accused. In this context, and especially in view of the gravity of the crimes concerned, it might be asked whether such a determination by a Chamber is sufficient to meet the stringent requirements of criminal law. Future Trial Chambers may require more factual specificity from the prosecution. This issue is likely to remain one of the most contentious for the ICTR. Nevertheless, despite its possible shortcomings, the *Musema* jurisprudence is yet another far-reaching affirmation of the applicability of the principle of superior responsibility to civilians, and contributes to broadening the protection under international criminal law.

## V APPLICABLE LAW

Prior to reaching its verdict, the Chamber reviewed the law applicable to all the counts with which Alfred Musema was charged. Two points are of particular interest: first, the definition of rape as constitutive of the crime of genocide; and

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid [895].

<sup>79</sup> Ibid [900].

<sup>80</sup> Ibid [906], [915], [925].

<sup>81</sup> Ibid [920].

<sup>82</sup> Ibid [893], [898], [913], [918], [923].

<sup>83</sup> Ibid [894], [899], [914], [919], [924].

<sup>84</sup> Ibid.

second, the analysis of the elements of the offence of conspiracy to commit genocide.

### A Rape Constitutive of Genocide

Alfred Musema was charged with personally raping two identified Tutsi women and also with having encouraged others to capture, rape and kill Tutsi women.<sup>85</sup> In its analysis of the applicable law, the Chamber reviewed the jurisprudence on rape from both of the International Criminal Tribunals — the ICTR and the ICTY.

International criminal jurisprudence provides two definitions of rape, derived from two different methodologies. On the one hand, in *Prosecutor v Akayesu*, the ICTR Trial Chamber I stated that ‘the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts’ and defined rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’<sup>86</sup> In contrast, in *Prosecutor v Furundzija*,<sup>87</sup> ICTY Trial Chamber II examined national laws on rape ‘to arrive at an accurate definition of rape based on the criminal law principle of specificity’.<sup>88</sup> It concluded that most legal systems consider rape to be ‘the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.’<sup>89</sup> The Trial Chamber in *Furundzija* finally defined the ‘objective elements of rape’ as follows:

- (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.<sup>90</sup>

In *Musema* a choice had to be made between these two methodologies. An ‘objective definition’ of rape could be retained, thus complying with the principle of specificity, as prescribed in *Furundzija*. Alternatively the Chamber could follow *Akayesu*, which, in avoiding a definition of rape with a ‘mechanical description of objects and body parts’,<sup>91</sup> encompassed in its definition the

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<sup>85</sup> ‘Amended Indictment’, *Prosecutor v Musema*, above n 12.

<sup>86</sup> *Akayesu*, above n 15, [597]–[598].

<sup>87</sup> *Prosecutor v Furundzija*, Case No IT-95-17/1-T (10 December 1998); 38 ILM 317 (*Furundzija*). For a commentary on *Furundzija*, see Kelly Ashkin, ‘The International War Crimes Trial of Anto Furundzija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes’ (1999) 12 *Leiden Journal of International Law* 935.

<sup>88</sup> *Furundzija*, above n 87, [177].

<sup>89</sup> *Ibid* [181]. The ICTY Trial Chamber II in *Furundzija* also noted a major discrepancy between the various national definitions of rape concerning the inclusion of forced oral penetration. It held that ‘the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity’ and should be included in the definition of rape: at [183].

<sup>90</sup> *Ibid* [185].

<sup>91</sup> *Akayesu*, above n 15, [597].

multiple and evolving forms of this crime. As the Chamber in *Musema* was constituted by the same three judges who had rendered *Akayesu*, it is not surprising that it favoured the *Akayesu* approach. In *Musema*,<sup>92</sup> the Chamber reiterated the definition of rape set forth in *Akayesu*, namely, ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’<sup>93</sup>

The rapes and sexual violence alleged against Alfred Musema were notably identified in the indictment as acts of genocide.<sup>94</sup> At this juncture, it is important to recall that a crime of genocide is established if: first, one of the acts listed under article 2(2) of the *ICTR Statute* has been committed; second, that the said act was directed against a specifically targeted group, being a national, ethnical, racial or religious group; and third, that the perpetrator had the special intent to destroy, in whole or in part, the specifically targeted group.<sup>95</sup> In *Musema*, the Chamber, in deciding whether rape and sexual violence could constitute genocide, reiterated the position taken in *Akayesu*, namely that rape and sexual violence constitute the infliction of serious bodily and mental harm on the victim. *Akayesu* held that rape and sexual violence fall under the category of acts of genocide enumerated under article 2(2)(b) of the *ICTR Statute* — causing serious bodily or mental harm.<sup>96</sup> The Chamber in *Musema* found that rape

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<sup>92</sup> *Musema*, above n 2, [220], [227].

<sup>93</sup> *Akayesu*, above n 15, [598]. The Chamber further found, in *Akayesu* at [688], that:

[C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict.

<sup>94</sup> ‘Amended Indictment’, above n 12.

<sup>95</sup> Art 2 of the *ICTR Statute* is reproduced verbatim from the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) arts 2–3. For an extensive analysis of the crime of genocide, see William Schabas, *Genocide in International Law: The Crimes of Crimes* (2000).

<sup>96</sup> *Musema*, above n 2, [908]. The Chamber in *Musema* specified that causing serious bodily or mental harm does not necessarily mean that the harm is permanent and irremediable: at [156]. In *Akayesu* the Chamber noted that rape represents one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm: at [731]. It should be noted that ICTR Trial Chamber II, in ‘Judgement and Sentence’, *Prosecutor v Kayishema & Ruzindana*, above n 15, concurred with the determinations made in *Akayesu*, according to which acts of rape and sexual violence are acts that amount to serious bodily harm: at [108]. However, the Trial Chamber II also added at [116]:

It is the view of the Trial Chamber that “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” includes methods of destruction which do not immediately lead to the death of members of the group. The Chamber adopts the above interpretation. Therefore the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.

constitutes genocide in the same way as any other act covered by article 2(2) of the *ICTR Statute*, provided that it is committed with the specific intent to destroy, in whole or in part, a particular group.

In determining whether the acts of serious bodily and mental harm, including rape and other forms of sexual violence for which Alfred Musema was held criminally responsible, could constitute genocide, the Chamber found that these acts ‘were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole.’<sup>97</sup> In support of this finding, the Chamber noted, for example, that during the rape of Nyiramasugi, Alfred Musema declared that, ‘[t]he pride of the Tutsis will end today’.<sup>98</sup> The Chamber found that such acts targeted Tutsi women in particular, and specifically contributed to their destruction and to that of the Tutsi group.<sup>99</sup> In this context, for the Chamber, the acts of rape and sexual violence were an integral part of the plan to destroy the Tutsi group.<sup>100</sup>

The reassertion that rape may be an act of genocide is of tremendous importance to the continuing development of international criminal law. *Akayesu* was certainly groundbreaking in acknowledging that rape can constitute genocide, and that it is punishable under international criminal law. However, much remains to be done to ensure that those responsible for rapes and sexual violence, which for too long have been tacitly accepted as war trophies, are systematically prosecuted. In this context, the findings in *Musema*, consistent with *Akayesu*, represent another milestone in the recognition of rape and sexual violence as fully-fledged crimes recognised under international law.

### B *The Crime of Conspiracy to Commit Genocide*

Alfred Musema was charged with conspiracy to commit genocide under count three of the indictment.<sup>101</sup> Conspiracy to commit genocide, punishable under article 2(3)(b) of the *ICTR Statute*, had never been judicially defined. The Chamber reviewed this crime and its constitutive elements.<sup>102</sup>

After retracing the history of the crime of genocide, from its emergence as a crime during the adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>103</sup> the Chamber reviewed the definitions of conspiracy and its constitutive elements in both the civil and common law systems.<sup>104</sup> It found that the constitutive elements of conspiracy are very similar in both

<sup>97</sup> *Musema*, above n 2, [933].

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* The Chamber also noted that a witness, testifying before it on the rape of Nyiramasugi, indicated that the latter was left for dead by those who raped her, and specified that ‘what they did to her is worse than death’: at [933].

<sup>100</sup> *Ibid* [933]–[935].

<sup>101</sup> ‘Amended Indictment’, above n 12. He was, however, not found guilty of this charge.

<sup>102</sup> For an analysis of the crime of conspiracy to commit genocide: see, eg, Schabas, above n 95, 259–66.

<sup>103</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, above n 95.

<sup>104</sup> *Musema*, above n 2, [186]–[190].

systems. Hence, it held that ‘conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.’<sup>105</sup> The Chamber also considered that the mens rea of the crime of conspiracy to commit genocide ‘rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group’.<sup>106</sup> Thus, ‘the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto*, the intent required for the crime of genocide, that is the *dolus specialis* of genocide.’<sup>107</sup> The Chamber also established that the crime of conspiracy to commit genocide is an inchoate offence, punishable even if it fails to produce a result; that is, even if the substantive offence of genocide has not actually been perpetrated.<sup>108</sup>

Addressing the question of whether a double conviction for genocide and conspiracy to commit genocide is permissible, the Chamber noted that although, under common law, an accused can in principle be convicted for both conspiracy and the substantive offence, this position has nevertheless been criticised.<sup>109</sup> In civil law systems, accused persons can only be convicted of conspiracy if either: the substantive offence has not been realised; or if they were part of a conspiracy but did not directly participate in the realisation by their co-conspirator(s) of the substantive offence.<sup>110</sup> In *Musema*, the Chamber decided to adopt the position most favourable to the accused, namely that an accused convicted of genocide could not, on the basis of the same acts, also be convicted of conspiracy to commit genocide.<sup>111</sup> The Chamber found that Alfred Musema was not criminally responsible for conspiracy to commit genocide as the Prosecutor had not adduced sufficient evidence to establish that he conspired with other persons to commit genocide.<sup>112</sup> The Chamber concluded:

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<sup>105</sup> Ibid [191].

<sup>106</sup> Ibid [192].

<sup>107</sup> Ibid.

<sup>108</sup> Ibid [194].

<sup>109</sup> Ibid [197]. See, eg, Don Stuart, *Canadian Criminal Law: A Treatise* (3<sup>rd</sup> ed, 1995) 647.

<sup>110</sup> *Musema*, above n 2, [196]. The Chamber noted that, in civil law systems

if the conspiracy is successful and the substantive offence is consummated, the accused will only be convicted of the substantive offence and not of the conspiracy. Further, once the substantive crime has been accomplished and the criminal conduct of the accused is established, there is no reason to punish the accused for his mere *résolution criminelle* (criminal intent), or even for the preparatory acts committed in furtherance of the substantive offence.

<sup>111</sup> Ibid [198]. The Chamber further indicated at [198] that:

Such a definition is in keeping with the intention of the Genocide Convention. Indeed, the “*Travaux Préparatoires*” show that the crime of conspiracy was included to punish acts which, in and of themselves, did not constitute genocide. The converse implication of this is that no purpose would be served in convicting an accused, who has already been found guilty of genocide, for conspiracy to commit genocide, on the basis of the same acts.

<sup>112</sup> Ibid [940].

Musema does not incur criminal responsibility for the crime of conspiracy to commit genocide, under Count 3, all the more so as, on the basis of the same acts, the Prosecutor presented evidence of Musema's participation in the commission of genocide, the substantive offence in relation to conspiracy.<sup>113</sup>

These findings are of prime importance, as they constitute the first judicial definition of conspiracy to commit genocide and, hence, set a necessary precedent. Of interest is whether the Chamber's conclusion that an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts will be followed by other trial chambers in future ICTR cases. This question is particularly pertinent in light of the recent ICTR Trial Chambers' decisions to grant the Prosecutor's requests to join several accused and to simultaneously charge them with both genocide and conspiracy to commit genocide.<sup>114</sup> The Prosecutor's argument is that to bring to the fore the totality of the culpable conduct of the accused, it is necessary not only to establish that they are responsible for having directly participated in the commission of the genocide in Rwanda in 1994, but also that they bear an additional responsibility for having conspired to commit the genocide.

## VI CONCLUSION

*Musema* highlights the main legal challenges facing international criminal law: the development of its procedure and applicable substantive law. In dealing with evidentiary and procedural issues at the international level, practitioners and judges are still obviously influenced by the legal tradition with which they are most familiar. Nevertheless, as was seen in the Chamber's approach to the admissibility and evidential value of the Swiss Files, international criminal law is growing from a symbiotic application of rules inspired by both the common and civil law systems, and should no longer be seen to operate in a supra-national vacuum.

International criminal justice is still so young that each judgment rendered by an international criminal jurisdiction constitutes yet another building block in the edifice of its jurisprudence. *Musema*, if only because it proposes the first judicial definition of the crime of conspiracy to commit genocide, sets an important precedent and accordingly contributes to the elaboration of substantive international criminal law.

CÉCILE APTEL<sup>†</sup> AND JAMIE A WILLIAMSON<sup>‡</sup>

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<sup>113</sup> Ibid [941].

<sup>114</sup> See, eg, 'Decision on Prosecutor's Motion for Joinder', *Prosecutor v Bagosora*, Case No ICTR-97-7 (29 June 2000); 'Decision on Prosecutor's Motion for Joinder', *Prosecutor v Barayagwiza*, Case No ICTR-97-19-I (6 June 2000).

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