11220 Mwanja

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

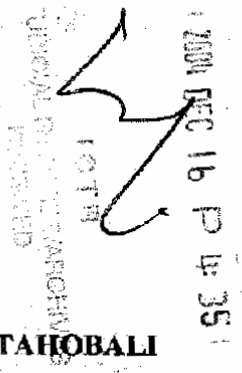
TRIAL CHAMBER II

ICTR-98-42-T
16-12-2004
(11220 - 11159)

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 16 December 2004



The PROSECUTOR

v.

Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI
(Case No. ICTR-97-21-T)
Sylvain NSABIMANA and Alphonse NTEZIRYAYO (Case No. ICTR-97-29A-T)
Joseph KANYABASHI (Case No. ICTR-96-15-T)
Elie NDAYAMBAJE (Case No. ICTR-96-8-T)

Joint Case No. ICTR-98-42-T

DECISION ON DEFENCE MOTIONS FOR ACQUITTAL UNDER RULE 98*BIS*

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Josette Kadji, Charles Tchakoute-Patie for Sylvain Nsabimana
Michel Marchand, Josette Santerre for Joseph Kanyabashi
Pierre Boulé, Claude Desrochers for Elie Ndayambaje

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the "Chamber");

BEING SEISED of:

- "Nyiramasuhuko's Motion For Acquittal Under Rule 98*bis*" ("Nyiramasuhuko's Motion") filed on 25 October 2004;[1]
- "Ntahobali's Motion For Acquittal Under Rule 98*bis*" ("Ntahobali's Motion") filed on 25 October 2004;[2]
- "Nsabimana's Motion For Acquittal Under Rule 98*bis*" ("Nsabimana's Motion") filed on 25 October 2004;[3]
- "Kanyabashi's Motion Under Rule 98*bis*" ("Kanyabashi's Motion") filed on 25 October 2004;[4]
- "Ndayambaje's Motion For Acquittal Under Rule 98*bis*" ("Ndayambaje's Motion") filed on 25 October 2004;[5]

NOTING that no Motion was filed by Nteziryayo under Rule 98*bis*;

CONSIDERING:

- The "Prosecutor's Response to Nsabimana's Motion Under Rule 98*bis*" (the "Response to Nsabimana") filed on 2 November 2004;
- The "Prosecutor's Response to the Motions of Ntahobali and Nyiramasuhuko for Partial Acquittal—Rule 98*bis*" (the "Response to Nyiramasuhuko and Ntahobali") filed on 1 November 2004;
- The Prosecutor's Response to Kanyabashi's Motion Under Rule 98*bis* (the "Response to Kanyabashi") filed on 1 November 2004;
- The Prosecutor's Response to Ndayambaje's Motion for Partial Acquittal – Rule 98*bis*" (the "Response to Ndayambaje") filed on 1 November 2004;

CONSIDERING:

- "Nsabimana's Reply to the Prosecutor's Response" ("Nsabimana's Reply") filed on 9 November 2004;[6]
- "Ntahobali's Reply to the Prosecutor's Response to the Motions of Ntahobali and Nyiramasuhuko for Partial Acquittal" ("Ntahobali's Reply") filed on 18 November 2004;[7]

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[1] The Motion was filed in French and originally entitled: « *Requête de Pauline Nyiramasuhuko en acquittement en vertu de l'article 98 bis du Règlement de procédure et de preuve* ».

[2] The Motion was filed in French and originally entitled: « *Requête de Arsène Shalom Ntahobali aux fins d'acquittement en vertu de l'article 98 bis du Règlement de procédure et de preuve* ».

[3] The Motion was filed in French and originally entitled: « *Requête aux fins d'acquittement de Sylvain Nsabimana en vertu de l'article 98 bis* ».

[4] The Motion was filed in French and originally entitled: « *Requête selon l'article 98 bis du Règlement de procédure et de preuve* ».

[5] The Motion was filed in French and originally entitled: « *Requête d'Elie Ndayambaje aux fins d'acquittement en application de l'article 98 bis du Règlement de procédure et de preuve* ».

[6] The Reply was filed in French and originally entitled: « *Réplique de Sylvain Nsabimana au 'Prosecutor's Response to Nsabimana's Motion Under Rule 98Bis' du 1er Novembre 2004* ».

[7] The Reply was filed in French and originally entitled: « *Réplique de Arsène Shalom Ntahobali à la Réponse du Procureur intitulée 'Prosecutor's Response to the Motions of Ntahobali and Nyiramasuhuko for Partial Acquittal'- Article 98 bis du Règlement de procédure et de preuve* ».

- "Ndayambaje's Reply to the Prosecutor's Response to Ndayambaje's Motion for Partial Acquittal" ("Ndayambaje's Reply") filed on 18 November 2004;[8]
- "Kanyabashi's Reply to the Prosecutor's Response to Rule 98*bis* Motion" ("Kanyabashi's Reply") filed on 29 November 2004;[9]
- "Nyiramasuhuko's Reply to the 'Prosecutor's Response to the Motions of Ntahobali and Nyiramasuhuko for Partial Acquittal'" ("Nyiramasuhuko's Reply") filed on 30 November 2004;[10]

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the matter pursuant to Rule 98*bis* on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

I. Submissions of the Parties on Nyiramasuhuko's Motion

Rule 98bis Standards

1. After its review of the jurisprudence on Rule 98*bis* from both the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY), the Defence for Pauline Nyiramasuhuko submits that the lack of reliable or credible evidence can justify an acquittal pursuant to Rule 98*bis*. The Defence further submits that acquittal shall be entered under Rule 98*bis* if the Prosecution fails to prove one of the constitutive elements of the crime charged. Acquittal under Rule 98*bis* may be limited to one specific fact pleaded in the Indictment.

2. The Prosecution submits that the Defence submissions extend considerably beyond the scope of Rule 98*bis*, which is to examine whether there is a prima facie case upon which a reasonable trier of fact could convict. Relying on both ICTR and ICTY Jurisprudence, the Prosecution submits that the relevant standard under Rule 98*bis* is whether there is evidence upon which a tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused. It adds that the Defence bears the burden of showing that there is no evidence which might lead to a conviction: if such evidence exists, the motion for acquittal must fail. The Prosecution challenges Defence allegations of vagueness of the Indictment and submits that, given the volume and complexity of the crimes charged, it would be impracticable and unreasonable to include every element of the Prosecution Case in the Indictment.

Acquittal on Count 1 (Conspiracy to Commit Genocide)

3. The Defence requests Pauline Nyiramasuhuko's acquittal on Count 1 (Conspiracy to Commit Genocide). The Defence relies on the Tribunal's judgments in the *Musema* and the *Ntakirutimana* cases for the definition of conspiracy and submits that it is not sufficient to

[8] The Reply was filed in French and originally entitled: « *Réplique d'Elie Ndayambaje à la Réponse du Procureur intitulée 'Prosecutor's Response to Elie Ndayambaje's Motion for Partial Acquittal'* ».
[9] The Reply was filed in French and originally entitled: « *Réplique de Joseph Kanyabashi à la Réponse du Procureur concernant la requête selon l'article 98*bis*du Règlement de procédure et de preuve* ».
[10] The Reply was filed in French and originally entitled: « *Réplique à la* 'Prosecutor's Response to the Motions of Ntahobali and Nyiramasuhuko for Partial Acquittal' ».

prove that genocide was committed; it must also be proved that the Accused made an agreement with others for the commission of genocide. Relying on the *Kamuhanda* Decision under Rule 98*bis*, the Defence adds that merely to mention the name of the alleged co-conspirators is not sufficient to sustain a conviction on the charge of Conspiracy to Commit Genocide. Finally, the Defence relies on the judgment of the ICTY Appeals Chamber in *Kupreskic* to submit that the lack of specificity of the Indictment should benefit the Accused.

4. The charges under Count 1 are pleaded in Paragraphs 5.1, 5.10, 6.13, 6.14, 6.20, 6.22, 6.25, 6.32, 6.33, 6.51, 6.52, 6.55 and 6.56 of the Amended Indictment. The Defence submits that the Prosecution failed to adduce sufficient evidence that Pauline Nyiramasuhuko conspired with others. The Defence adds that those enumerated paragraphs are vague and do not relate to the constitutive elements of the crime of conspiracy. The Defence analyses some factual paragraphs of the Indictment on which Count 1 relies:

- Paragraph 5.1: The Prosecution failed to adduce evidence of Pauline Nyiramasuhuko's participation in working out a plan with intent to exterminate the Tutsi population. Relying on the judgment in the case of *Ntagerura* et al (the *Cyangugu* Case), the Defence submits that this paragraph is vague and does not specify how, when and where Pauline Nyiramasuhuko allegedly had recourse to hatred and ethnic violence, trained and distributed weapons to militiamen or the prepared lists. Finally, the Defence submits that the Prosecution failed to adduce evidence of a conspiracy between the mentioned persons for the execution of the alleged plan.

- Paragraph 6.13: The Prosecution failed to adduce evidence that "the Ministers demanded weapons to distribute in their respective home *préfectures*, knowing that the weapons would be used in the massacres".

- Paragraph 6.14: The Defence admits that Prosecution Expert Witnesses Guichaoua and Des Forges testified on the facts pleaded in this paragraph, but challenges their testimony in light of a speech by Minister Niyitegeka in Butare on 30 April 1994 that was broadcasted on Radio-Rwanda and the alleged diary of Pauline Nyiramasuhuko, which mentions that she also attended "pacification" meetings in Gisenyi, Kigali Rural and Ruhengeri.

- Paragraph 6.32: The Defence admits that Prosecution Witness SJ testified on the facts pleaded in this paragraph, but challenges her credibility and stresses that no evidence was adduced as to the substance of the discussions during this meeting, as alleged.

- Paragraph 6.33: The Defence admits that Prosecution Witness RE testified on the facts pleaded in this paragraph, but challenges his credibility in light of testimonies of other Prosecution witnesses.

- Paragraph 6.52: This paragraph does not meet the requirements of specificity as defined in the *Cyangugu* Judgment. The Prosecution failed to adduce evidence that Pauline Nyiramasuhuko worked out a plan for extermination of the Tutsi.

- Paragraph 6.55: The Prosecution failed to adduce evidence in relation to facts pleaded in this paragraph.

- Paragraph 6.56: This paragraph is a kind of conclusion on various allegations that were not proved and does not constitute, by itself, any "evidence" in relation to the Counts pleaded in the Amended Indictment.

5. In its Response, the Prosecution submits that the Indictment must be considered as a whole, and that individual paragraphs must not be viewed in isolation. The Prosecution relies in particular on Prosecution Witness SJ's testimony, as well as testimonies and reports of Prosecution Expert Witnesses Guichaoua and Des Forges.

6. In its Reply, the Defence repeats that the Prosecution failed to adduce factual evidence of a Conspiracy between the alleged co-conspirators to commit Genocide at a specific date and place. Expert Witness Guichaoua's analysis of the alleged Diary of Pauline Nyiramasuhuko implied that MRND meetings were held, but there is no evidence that the MRND conspired with the Accused to commit genocide. The reference made by Expert Witness Des Forges to the declarations of Sylvain Nsabimana cannot be relied upon and are contradicted by the alleged diary of the Accused Nyiramasuhuko.

Acquittal on Count 4 (Direct and Public Incitement to Commit Genocide)

7. The Defence requests Pauline Nyiramasuhuko's acquittal on Count 4 of the Amended Indictment (Direct and Public Incitement to Commit Genocide). The Defence relies on the *Akayesu* Judgment (TC) for the definition of the crime. The Defence submits that the charges under this Count are pleaded in Paragraphs 5.1, 5.8, 5.10, 6.14, 6.20, 6.22, 6.33, 6.38 and 6.47 of the Amended Indictment. The Defence submits that the Trial Chamber should acquit the Accused of those paragraphs which do not relate to any specific constitutive element of the crime. Relying on the *Cyangugu* Judgment (TC), the Defence explains that it is not sufficient for the Prosecution to allege facts, but that those alleged facts must relate to the constitutive elements of the crime.

8. The Defence then analyses the factual paragraphs of the Indictment on which Count 4 relies:

- Paragraph 5.1: The Defence submits that this paragraph does not refer to the crime of Incitement to Commit Genocide or its constitutive elements.

- Paragraph 5.8: The Defence submits that the Prosecution failed to adduce evidence that Pauline Nyiramasuhuko made any speech inciting the population to exterminate the Tutsi and their accomplices. The Defence submits that words allegedly spoken by Pauline Nyiramasuhuko at the prefectoral office do not fulfil the requirements of incitement.

- Paragraph 5.10: The Defence submits that the Prosecution failed to adduce evidence of the facts pleaded in this paragraph and that those facts have no connection with the Crime of Incitement to Commit Genocide.

- Paragraph 6.14: The Defence admits that this paragraph relates to Incitement, but submits that it lacks specificity. While conceding that dates and places where those alleged incitements occurred are mentioned, the Defence contends that the people who were addressed, and the particular words that were spoken are not indicated. The Defence therefore submits that this paragraph fails to relate to a

specific element of the crime, and that no evidence was adduced to support those facts.

- Paragraph 6.20: The Defence submits that the replacement of *Préfet* Habyalimana has no connection with the crime of Incitement and that the paragraph fails to relate to one specific element of the crime.

- Paragraph 6.22: The Defence submits that Pauline Nyiramasuhuko is charged under Article 6(1) of the Statute and that this paragraph does not allege any incitement that she may have personally made.

- Paragraph 6.33: The Defence submits that the only allegation in this paragraph relates to an alleged private discussion between three people, and cannot be considered as public incitement to commit genocide.

- Paragraph 6.38 and 6.47: The Defence submits that those paragraphs lack the required specificity.

9. In its Response, the Prosecution relies on the definition of Incitement of the *Akayesu* Judgment (TC) as "directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings [...]". Among the "public places", the Prosecution refers, in particular to the Butare prefectoral office and the investiture of Elie Ndayambaje as *bourgmestre* of Muganza *commune* on 21 June 1994. It argues that, by her presence at the said event, Pauline Nyiramasuhuko acquiesced in the incitement. The Prosecution relies in particular on testimonies of Prosecution Witnesses RV, FAP, QBP, QBQ, SJ, SS and SU, as well as Prosecution Expert Witness Guichaoua.

10. The Prosecution then addresses the various Paragraphs of the Amended Indictment on which Count 4 relies and submits that they ought to be considered as a whole and not in isolation of one another:

- Paragraph 5.1: The Prosecution submits that the Conspiracy referred to - i.e. the recourse to hatred and ethnic violence and the organization and ordering of massacres - have been established and are pertinent to Incitement.

- Paragraph 5.8: The Prosecution relies on testimonies by Prosecution Witnesses FAP, QBP, QBQ, SJ, SS and SU to submit that evidence was adduced confirming the presence and tacit acquiescence of Pauline Nyiramasuhuko at the installation of Sylvain Nsabimana as *Préfet* and of Elie Ndayambaje as *bourgmestre* of Muganza *commune*, where various speeches of Incitement to Commit Genocide were made.

- Paragraph 5.10: The Prosecution submits that this paragraph is relevant to Count 4 since the creation of militia, specifically *Interahamwe*, was an integral part of the plan to exterminate the Tutsi. The existence of *Interahamwe* committees and the participation of Pauline Nyiramasuhuko in some of them were confirmed by Prosecution Expert Witness Guichaoua.[11]

[11] T. 29 June 2004, p. 70-74.

- Paragraph 6.14: The Prosecution submits that this paragraph is relevant to Count 4 because, according to Prosecution Expert Witness Guichaoua, the Genocide was on the agenda of meetings attended by Pauline Nyiramasuhuko, including cabinet and "pacification" meetings.[12]

- Paragraph 6.20: The Prosecution submits that this paragraph is relevant to Count 4 because, after the removal of *Préfet* Habyalimana, the installation of Sylvain Nsabimana was the occasion for various speeches of Incitement.

- Paragraph 6.22: The Prosecution submits that this paragraph is relevant to Count 4 because the massacres in Butare intensified after the speeches of Incitement made during the installation of Sylvain Nsabimana.

- Paragraph 6.33: The Prosecution relies on evidence of Prosecution Witness RE and submits that it is sufficient to establish Incitement for the purpose of a Rule 98*bis* determination.

- Paragraph 6.38: The Prosecution submits that there is no legal obligation to adduce evidence of the names of every person incited. Besides, there is sufficient evidence on which a reasonable trier of fact could convict on a Count of Incitement.

- Paragraph 6.47: The Prosecution submits that this paragraph should be read in conjunction with the other Paragraphs relied on in support of Count 4.

11. In its Reply, the Defence submits that no evidence was adduced of a speech made by the Accused. The Defence submits that Pauline Nyiramasuhuko is charged with this Count under Article 6(1) of the Statute and that, according to the jurisprudence, the Incitement must have been committed by the Accused herself. The Defence recalls the Appeals Chamber's Decision that Prosecution Witness RV's testimony cannot be used against the Accused to demonstrate that she indeed attended Elie Ndayambaje's swearing-in ceremony. The Defence further submits that the persons she allegedly talked to, were accompanying her precisely in order to attack people and that, in those circumstances, her words cannot be considered as Incitement to Commit Genocide. The Defence finally submits that other considerations, such as the creation of militia, the commission of massacres, and the status of the Accused as a Minister, are irrelevant to the Count of Incitement.

Acquittal on Counts Pleaded Under Article 6(3) of the Statute

12. The Defence requests Pauline Nyiramasuhuko's acquittal on all Counts pleaded under Article 6(3) of the Statute. The Defence submits that Pauline Nyiramasuhuko's *de jure* authority was limited to the personnel of her Ministry at the time of the events and that the Indictment does not mention any crime that was allegedly committed by these personnel. The Defence further submits that Pauline Nyiramasuhuko did not have *de facto* authority over anyone and adds that the Indictment does not give the names of any person alleged to have been her subordinates. The Defence contends that in order for a civilian to be considered in a superior position under Article 6(3), that person must have the same degree of control over his or her subordinates as a military commander, as well as the material capacity to prevent and sanction offences committed by them.

[12] T. 29 June 2004, p. 48, 76

13. In its Response, the Prosecution submits that the Defence's argument that Pauline Nyiramasuhuko only had authority over staff of her ministry, does not take into account the ample evidence that she exercised authority over the *Interahamwe* and soldiers, nor her stature and influence in the politics of Rwanda before and during the Genocide. According to the Prosecution, the Accused was at all relevant times in April 1994 a very enlightened and influential person and was privy to the genocidal plans; her stature in her native region, education, position in government and political activities in the local area placed her in authority over those she ordered to commit the crimes for which she is charged. The Prosecution submits that sufficient evidence was led to show that Pauline Nyiramasuhuko had effective control over the *Interahamwe* and soldiers. As a member of the Government, she could have prevented or stopped the erection of a roadblock outside her residence where several crimes were committed. The Prosecution relies on testimonies of Prosecution Witnesses FA, FAP, QBP and QBQ.

14. In its Reply, the Defence stresses that Pauline Nyiramasuhuko's *de jure* authority was limited to the personnel of her Ministry and that the Prosecution failed to adduce evidence of her *de facto* authority over the *Interahamwe* and soldiers. The Defence further argues that the fact that Pauline Nyiramasuhuko was a Minister is irrelevant, since the Statute of the Tribunal only provides for the individual responsibility of the Accused. The Defence submits that the Witnesses on which the Prosecution relies did not lead evidence of Pauline Nyiramasuhuko's *de facto* authority.

Acquittals on Counts 10 and 11 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II)

15. The Defence relies on the submissions made on behalf of Arsène Shalom Ntahobali to request acquittal on Counts 10 and 11 (Serious Violations of Common Article 3 and Additional Protocol II).

16. In its Response, the Prosecution repeats the submissions it made for Arsène Shalom Ntahobali.

17. The Defence further relies on Arsène Shalom Ntahobali's Reply on this point.

Acquittal on Miscellaneous Charges Pleaded in the Amended Indictment

18. The Defence requests Pauline Nyiramasuhuko's acquittal on the following paragraphs of the Amended Indictment:

- Paragraphs 1.13, 1.14, 1.15, 1.17, 1.20, 1.21, 1.26, 1.27, 1.28, 1.29, 1.30, 5.2, 5.3, 5.8, 5.9, 5.11, 5.13, 5.14, 5.15, 5.16, 6.9, 6.10, 6.13, 6.17, 6.24, 6.38, 6.39, 6.42, 6.44, and 6.45: The Prosecution failed to adduce evidence in relation to facts pleaded in those paragraphs.

- Paragraph 1.16: Prosecution Expert Witness Des Forges commented on Mugesera's speech, but the Defence challenges the credibility of her testimony.

- Paragraph 1.18: Prosecution Expert Witness Guichaoua testified that both Hutu and Tutsi people were arrested. The Prosecution failed to adduce evidence of the preparation of new lists which would have been used in 1994 and of the seizure of such a list in the vehicle of the Army Chief of Staff.

- Paragraph 1.19: The Defence relies on the arguments developed as regards Paragraph 6.33 of the Amended Indictment.

- Paragraph 1.24: Although evidence of the killing of political opponents was adduced, the Prosecution failed to prove that soldiers were in possession of lists of names and proceeded to arrest and confine political opponents, and that Pauline Nyiramasuhuko was evacuated to a safe location.

- Paragraphs 5.1, 6.14, 6.32, 6.33, 6.52, 6.55 and 6.56: The Defence relies on the arguments previously developed as regards those paragraphs.

- Paragraph 5.7: The Defence relies on the arguments developed as regards Paragraph 1.16 of the Amended Indictment. Evidence was given that Mugesera was no longer MRND Vice-Chairman for Gisenyi *Préfecture* on 22 November 1992. Prosecution Expert Witness Des Forges testified that this speech was never broadcast.

- Paragraph 6.4: Although the murder of Prime-Minister Agathe Uwilingyimana was proved, there is no evidence of the people who killed her, nor of her arrest and sexual assault.

- Paragraph 6.21: According to the evidence adduced, Jean Kambanda spoke before *Président* Sindikubwabo during this meeting.

- Paragraph 6.23: Some Prosecution Witnesses testified about one plane with Presidential Guard soldiers, but none mentioned the Para-Commando Battalion. Prosecution Expert Witness Des Forges testified that no plane carrying soldiers landed in Butare and that Presidential Guard soldiers were very few in Butare.

- Paragraph 6.30: No mention of militiamen Jumapili and Nsengiyumva was made by Prosecution Witnesses who testified that Pauline Nyiramasuhuko came to the prefectoral Office.

- Paragraph 6.47: This paragraph is vague. It does not mention the way in which Pauline Nyiramasuhuko allegedly aided and abetted the population in killing the Tutsi. This allegation does not relate to any constitutive element of the crime.

- Paragraph 6.50: The Paragraph is vague. There is no link between Pauline Nyiramasuhuko and crimes allegedly committed by soldiers in Kigali and other *préfectures*.

- Paragraph 6.54: The Prosecution failed to adduce evidence as regards the alleged subordinates of Pauline Nyiramasuhuko.

19. The Prosecution does not respond to those specific requests.

20. In its Reply, the Defence notes this absence of Prosecution Response.

II. Submissions of the Parties on Ntahobali's Motion

21. As did the Defence of Nyiramasuko, after reviewing the jurisprudence on Rule 98*bis* from both the ICTR and the ICTY, the Defence for Arsène Shalom Ntahobali submits that the lack of reliability or credibility of evidence can justify an acquittal pursuant to Rule 98*bis*. Similarly, the Defence submits that acquittal shall be entered under Rule 98*bis* when the Prosecution omits to prove one of the constitutive elements of the crime.

22. In its Response, the Prosecution makes the same submissions as for Pauline Nyiramasuhuko's Motion on this point.

23. In its Reply, the Defence submits that the Prosecutor's Pre-Trial Brief and the summaries of anticipated evidence ("will-say" statements) of Prosecution witnesses cannot replace concrete evidence adduced in the Prosecution's case for determination under Rule 98*bis*. The Defence challenges the Prosecution submission that its only burden at this stage is to make a *prima facie* case and submits that, according to the jurisprudence, the Prosecution must have led sufficient evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the Accused. In reply to the Prosecution submissions that, given the volume and complexity of the crimes charged, it would be impracticable and unreasonable to include every element of the Prosecution case in the Indictment, the Defence submits that this argument cannot be an excuse for the lack of evidence on charges pleaded in the Indictment.

Acquittal on Count 1 (Conspiracy to Commit Genocide)

24. The Defence requests Arsène Shalom Ntahobali's acquittal on Count 1 (Conspiracy to Commit Genocide). The Defence relies on the *Musema* and *Ntakirutimana* Judgments (TC) for the definition of Conspiracy and submits that it is not sufficient to prove that Genocide was committed, but that evidence must be led that the Accused reached an agreement with others for the commission of the crime. The Defence argues that Paragraphs 5.1, 6.51, 6.52, 6.55 and 6.56 of the Amended Indictment, which the Prosecution relies upon in support of Count 1, do not reflect the constitutive elements of the crime of Conspiracy. Relying on the *Cyangugu* (TC) and *Kupreskic* (AC) Judgments, the Defence submits that the lack of specificity of the Amended Indictment should justify the acquittal of the Accused on this Count. Relying on the *Kamuhanda* Decision under Rule 98*bis*, the Defence adds that the sole reference to the name of co-conspirators is not sufficient to convict an accused under the count of Conspiracy: evidence must be adduced that an agreement was made between the alleged co-conspirators. The Defence submits that the Prosecution failed to adduce such evidence. The Prosecution rather tried to infer that he was part of a Conspiracy, on the basis of *prima facie* evidence that the Accused committed other alleged crimes. Relying on the *Ntakirutimana* Judgment, the Defence submits that such an inference is not enough and cannot be considered as *prima facie* evidence that the Accused took part in the Conspiracy.

25. The Prosecution responds that, with his leadership of the *Interahamwe*, it is inconceivable that the Accused did not attend any meeting in furtherance of the Genocide. The Prosecution refers specifically to the evidence of Prosecution Witness FA and Prosecution Expert Witness Des Forges. The Prosecution further submits that the Count is not only relying on the mother and son relationship between Nyiramasuhuko and Ntahobali, but on evidence that they committed crimes together and aided and abetted each other and other persons to commit crimes. The Prosecution notes the Defence admission that evidence was adduced that Ntahobali committed crimes with other conspirators and submits that it is sufficient to prove a partial element of the crime of Conspiracy.

26. In its Reply, the Defence submits that the Prosecution improperly invites the Trial Chamber to infer, from evidence that Arsène Shalom Ntahobali allegedly committed other crimes, that he attended meetings in furtherance of the Genocide. The Defence stresses that evidence must be adduced of the existence of Conspiracy itself, without prejudice to evidence of the crimes allegedly committed in its furtherance. The Defence adds that evidence of the

Accused family relationship with Pauline Nyiramasuhuko or, of his responsibility under Article 6(3) of the Statute cannot replace evidence of the Conspiracy, which the Prosecutor failed to adduce.

Acquittal on Counts 10 and 11 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II)

27. The Defence requests Arsène Shalom Ntahobali's acquittal on Counts 10 and 11 (Serious Violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II). Relying on the *Semanza* Judgment (TC), the Defence submits that the Prosecution did not fulfill the first criterion for conviction under this Count, namely that a non-international armed conflict existed on the territory of the concerned State. The Defence argues that the armed conflict between the Rwandan Government and the RPF was international: Prosecution Expert Witnesses Des Forges and Guichaoua testified that the Ugandan Army was implicated in the conflict since 1990 and that, as soon as two or more States are involved, the conflict becomes international.

28. In its Response, the Prosecution submits that the fact that units of Armed Forces of more than one State might have been involved, does not necessarily render the conflict international and that the role of the *Interahamwe* cannot be ignored. The Prosecutor adds that the Defence selectively quoted Prosecution expert witnesses: Prosecution Expert Witness Des Forges was referring to the invasion of 1 October 1990 in the quoted abstract, and Prosecution Expert Witness Guichaoua concluded that it was not an international conflict. The Prosecution further relies on the Report on the Situation of Human Rights in Rwanda submitted by Mr Degni-Segui (Prosecution Exhibit 112A) which mentioned the applicability of Common Article 3 of the Geneva Conventions and on the *Kayishema/Ruzindana* and *Rutaganda* Judgments (TC) which concluded that there was an internal armed conflict in Rwanda between 1 January and 17 July 1994.

29. In its Reply, the Defence submits that the Prosecution cannot rely on the finding of the *Kayishema/Ruzindana* and *Rutaganda* Judgments that the conflict was internal because the internal nature of the conflict was not challenged in those cases. The Defence stresses that the internal nature of the conflict is now challenged and that the onus lies on the Prosecution to demonstrate that the armed conflict was indeed non-international.

Acquittal on Miscellaneous Charges Pleaded in the Amended Indictment

30. The Defence requests Arsène Shalom Ntahobali's acquittal on the following Paragraphs of the Amended Indictment:

- Paragraphs 5.1, 6.52 and 6.56: The Prosecution failed to adduce evidence in relation to facts pleaded in those paragraphs.
- Paragraph 6.35: The Prosecution adduced evidence on events concerning the city of Butare only; therefore, there is no evidence that the Accused traveled throughout the Préfecture in search of Tutsi.
- Paragraphs 6.51 and 6.53: Those paragraphs lack the required specificity to enter a judgment of guilt.

- Paragraph 6.55: This paragraph lacks the required specificity as regards the alleged subordinates of the Accused. There is also no evidence that the Accused was considered as a person of authority, whether political or military.

31. The Prosecution responds by making the following submissions:

- Paragraphs 5.1, 6.52, 6.56: The Prosecution submits that it has adduced ample and credible evidence of the involvement of the Accused in the massacres and assaults as part of a conspiracy to exterminate the Tutsi population. The Prosecution adds that the fact that those paragraphs had been sufficiently pleaded was determined by the Trial Chamber in its 16 February 2004 Decision to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible.

- Paragraph 6.35: The Prosecution relies specifically on factual evidence of Prosecution Witnesses FA, QBP, QBQ, QY, SJ, TA and TK who testified that the Accused transported refugees from the Butare *Préfecture* office and other locations in Butare to be killed. The Prosecution further submits that it has no legal obligation to state every geographical location in Butare where the events in question took place.

- Paragraphs 6.51 and 6.53: Prosecution submits that evidence showed that there was a close collaboration between soldiers and militias, such as the *Interahamwe* who were led by the Accused, and that the Accused and the *Interahamwe* extensively engaged in rapes and sexual assaults in Butare. The Prosecution relies in particular on the evidence of Prosecution Expert Witness Des Forges as regards Ntahobali's role in the *Interahamwe*.[13]

32. In its Reply, the Defence makes the following submissions:

- Paragraphs 5.1, 6.52 and 6.56: The Prosecution Response is a mere summary of the Indictment without further evidence. The reference to the Trial Chamber's Decision of 16 February 2004 is irrelevant, because the finding that the charges were sufficiently pleaded does not mean that there were proved.

- Paragraph 6.35: The evidence on which the Prosecution relies has no relation with the fact pleaded in the Amended Indictment, that the Accused travelled throughout the *Préfecture* in search of Tutsi. The Prosecution failed to adduce evidence that the Accused went everywhere in the Butare *Préfecture* searching for Tutsi.

- Paragraphs 6.51 and 6.53: Prosecution Expert Witness Des Forges did not give evidence that "soldiers gave assistance to militiamen, notably by providing them logistical support, i.e. weapons, transport and fuel", as pleaded in Paragraph 6.51. The Prosecution also failed to adduce evidence that "rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda", as pleaded in Paragraph 6.53. Nor did the Prosecution adduce evidence as regards the role of the Accused in the facts pleaded in those two Paragraphs.

- Paragraph 6.55: The Prosecution did not challenge the Defence submissions on this paragraph.

[13] T. 9 June 2004, p. 6-9.

III. Submissions of the Parties on Nsabimana's Motion

Rule 98bis Standards

33. After making submissions in relation to the admissibility of the Motion, and relying on several decisions rendered by the ICTY, the Defence for Sylvain Nsabimana submits that the criterion for acquittal under Rule 98*bis* is insufficiency of Prosecution evidence to sustain a conviction on counts charged in the Indictment.

34. In its Response, the Prosecution relies on the Decision rendered by Trial Chamber III in the *Semanza* Case on 27 September 2001[14] to submit that, pursuant to Rule 98*bis*, a judgement of acquittal shall be entered at the close of the Prosecution Case if the Chamber finds that the evidence, if believed, is insufficient for a reasonable trier of fact to find that guilt has been proved beyond a reasonable doubt. The Prosecution argues that, once the Prosecutor has established a *prima facie* case against the Accused, it is incumbent on the Trial Chamber to require the Accused to answer the charges against him. Relying on the same *Semanza* Decision, the Prosecution further submits that arguments for quashing the Indictment cannot be raised under Rule 98*bis*. As regards the issue of credibility and reliability of evidence, the Prosecution relies on the Decision rendered by the ICTY in the *Kordic and Cerkez* Case on 6 April 2000[15] to submit that a Trial Chamber is obliged to take these matters into account only where the Prosecution's case has completely broken down, either during its own presentation, or as a result of such fundamental questions being raised in cross examination as to the reliability and credibility of witnesses that the Prosecution is left without a case.

Acquittal on Count 5 (Crime Against Humanity – Murder)

35. The Defence requests the acquittal of Sylvain Nsabimana under Count 5 (Murder as a Crime Against Humanity). The Defence submits that the Indictment does not charge Sylvain Nsabimana with any murder and that there is no evidence that Sylvain Nsabimana, or his subordinates, committed murder. Alternatively, the Defence requests the acquittal of Sylvain Nsabimana under Count 5 pursuant to Article 6(1) of the Statute.

36. In its Response, the Prosecution submits that murders are mentioned in Paragraphs 5.1, 5.8, 5.12 and 5.59 of the Amended Indictment and that questions relating to defects of the Indictment cannot be raised on the basis of Rule 98*bis*. Relying on the testimonies of Prosecution Witnesses TK and RE,[16] the Prosecution further submits that the murder Count has been proven beyond a reasonable doubt.

37. In its Reply, the Defence for Nsabimana submits that Prosecution Witness TK never testified that Sylvain Nsabimana was present when his brother was killed and when the man called Pierre or the Mbasha family were abducted. The Defence adds that Prosecution Witness RE testified about the transfer of refugees to Nyange, without direct evidence that

[14] *Prosecutor v. Semanza*, ICTR-97-20-T, "Decision on the Defence Motion for a Judgment of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment (Article 98*bis* of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a Judgment of Acquittal" (TC), 27 September 2001.
[15] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, "Decision on Defence Motions for Judgment of Acquittal" (TC), 6 April 2000.
[16] T. 24 February 2003, p. 11, 14, 19.

those refugees were subsequently killed. The Defence therefore submits that evidence led by those witnesses is not sufficient to establish that Sylvain Nsabimana participated in the murder of any specific person.

Acquittal on Count 6 (Crime Against Humanity – Extermination)

38. The Defence requests the acquittal of Sylvain Nsabimana under Count 6 (Extermination as a Crime Against Humanity). Relying on the *Akayesu* Judgment of 2 September 1998,[17] the Defence submits that for an Accused to be convicted under this Count, it must be proved that he or his subordinates participated in the killing of certain named or described persons. The Defence submits that the Prosecution failed to give admissible evidence of such participation. Alternatively, the Defence requests the acquittal of Sylvain Nsabimana under Count 6 pursuant to Article 6(1) of the Statute.

39. In its Response, the Prosecution refers to the testimonies of Prosecution Witnesses QBQ, QCB, QBP, RV and TK to submit that there is sufficient evidence on this Count.

40. In its Reply, the Defence for Nsabimana submits that the witnesses relied upon by the Prosecution, led no direct evidence of Sylvain Nsabimana's participation in the related massacres. Prosecution Witness RV even testified that he had no evidence against Sylvain Nsabimana.

Acquittal on Count 8 (Crime Against Humanity – Other Inhumane Acts)

41. The Defence requests the acquittal of Sylvain Nsabimana under Count 8 (Inhumane Acts as Crime Against Humanity). Relying on the *Kayishema/Ruzindana* Judgment of 21 May 1999,[18] the Defence submits that factual allegations pleaded in the Indictment under this Count are vague and do not sufficiently specify the acts that are allegedly attributed to the Accused.

42. In its Response, the Prosecution refers to the testimonies of Prosecution Witnesses RE and TK to submit that there is sufficient evidence on this Count.

43. In its Reply, the Defence relies on the findings in the *Kayishema/Ruzindana* Judgment (TC) that to prove a charge of Inhumane Acts, the Prosecution must rely on acts that are different from those enumerated in Article 3 of the Statute, but which share the same level of seriousness as those acts. The Defence submits that the Prosecution failed to adduce evidence that the acts narrated by Prosecution Witnesses RE and TK were different and share the same level of gravity as other acts enumerated in Article 3 of the Statute.

Acquittal on Count 9 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II)

44. The Defence requests the acquittal of Sylvain Nsabimana on Count 9 (Killing and Violence to Health and to the Physical or Mental Well-Being of Civilians as Serious Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II). The Defence submits that, when a condition for the application of this Count is the international

[17] *Prosecutor v. Akayesu*, ICTR-96-4-T, "Judgment"(TC), 2 September 1998.
[18] *Prosecutor v. Kayishema/Ruzindana*, ICTR-95-1-T, "Judgment and Sentence" (TC), 21 May 1999.

nature of the armed conflict, Paragraph 2.6 of the Amended Indictment states that the armed conflict in Rwanda was non-international.

45. In its Response, the Prosecution submits that it is erroneous for the Defence to argue that there must be an international armed conflict for this Count to be applicable. The Prosecution relies on findings made in the *Rutaganda*[19] and *Semanza*[20] Judgments to support the argument that this Count applies in the context of non-international armed conflicts.

Acquittal on Miscellaneous Charges Pleaded in the Amended Indictment

46. The Defence for Sylvain Nsabimana requests acquittal under Rule 98*bis* on charges pleaded in the following paragraphs of the 12 August 1999 Amended Indictment under Count 1 (Conspiracy to Commit Genocide), Count 2 (Genocide), Count 3 (Complicity in Genocide), Count 4 (Direct and Public Incitement to Commit Genocide), and Count 7 (Persecution as a Crime Against Humanity):

- Paragraph 6.25: The Defence submits that the Prosecution failed to prove that, on Pauline Nyiramasuhuko's request, Sylvain Nsabimana ordered the military authorities to provide her with reinforcements to proceed with the massacres in Ngoma *commune*.
- Paragraph 6.26: The Defence submits that the Prosecution failed to prove that Sylvain Nsabimana, in the days following his assumption of office, called a meeting of all *bourgmestres* of the *Préfecture*.
- Paragraph 6.28: The Defence submits that the Prosecution failed to prove that Pauline Nyiramasuhuko called a meeting in April 1994 and that Sylvain Nsabimana attended the said meeting. The Defence further submits that the Prosecution gave no indication as to the specific date of this meeting or the topics that were allegedly discussed during the meeting.
- Paragraph 6.33: The Defence submits that this paragraph does not relate to Sylvain Nsabimana.
- Paragraphs 6.51 and 6.52: The Defence submits that this paragraph does not relate to Sylvain Nsabimana.
- Paragraph 6.55: The Defence submits that Sylvain Nsabimana is not among the categories of persons implicated in this paragraph, namely "military personnel, gendarmes and Hutu militiamen".
- Paragraph 6.56: The Defence submits that Sylvain Nsabimana is not alleged to have been a soldier or a militiaman. This paragraph therefore does not relate to him.

47. In its Response, the Prosecution makes the following submissions:

- Paragraph 6.25: The Prosecution admits that there is no specific evidence on the allegations made in this paragraph.

[19] *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment and Sentence (TC), 6 December 1999, Paragraph 91.
[20] *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence (TC), 15 May 2003, Paragraph 354.

- Paragraph 6.26: The Prosecution submits that the Rules establish no hierarchy and no limitation on the admission of evidence, and that the Prosecution has presented sufficient evidence to prove beyond a reasonable doubt that in the days following his taking of office, Sylvain Nsabimana called a meeting of all *bourgmestres*. The Prosecution relies in particular on the testimony of Prosecution Witness RV[21] and the reports of Prosecution Experts Alison Des Forges[22] and André Guichaoua.[23]

- Paragraph 6.28: The Prosecution submits that, according to the jurisprudence, challenges concerning defects of the indictment cannot be considered at this stage. The Prosecution further relies on declarations made by Sylvain Nsabimana in the document entitled "The Truth About the Massacres in Butare"[24] and on the testimony by Prosecution Expert Witness Alison Des Forges.[25]

- Paragraph 6.33: The Prosecution submits that even though the name of Sylvain Nsabimana is not mentioned, he was still *Préfet* of Butare at that time and by his position of authority, he was responsible for the acts of his subordinates. The Prosecution further submits that Accused Alphonse Nteziryayo and Arsène Shalom Ntahobali are co-conspirators in the same conspiracy with Sylvain Nsabimana as alleged in Paragraph 5.1 of the Amended Indictment which is not challenged by the Defence.

- Paragraphs 6.51 and 6.52: The Prosecution submits that Sylvain Nsabimana was *Préfet* of Butare and that, as such, he was responsible for his own acts or omission. He was also responsible, by his *de jure* and/or *de facto* authority, of all criminal acts committed by Arsène Shalom Ntahobali at the roadblock where Tutsi were searched and killed. Searching and killing was one component of the plan elaborated, adhered to and executed by Sylvain Nsabimana in conspiracy with others, including Pauline Nyiramasubuko and Arsène Shalom Ntahobali. Those persons are mentioned in Paragraph 6.51 and, as alleged in Paragraph 5.1 of the Amended Indictment, they conspired with Sylvain Nsabimana. This allegation is not challenged by the Defence.

- Paragraph 6.55: The Prosecution submits that the allegations contained in this paragraph concern the context in which the crimes allegedly committed by Sylvain Nsabimana were perpetrated. The Prosecution further submits that, according to the allegations contained in Paragraph 6.57 of the Amended Indictment, as *Préfet*, Sylvain Nsabimana adopted and elaborated a strategy of massacres and assaults in the country in conspiracy with civil and military authorities. This allegation is not challenged by the Defence.

- Paragraph 6.56: The Prosecution submits that, although Sylvain Nsabimana was not in charge of military functions, this paragraph describes the *modus operandi* of the conspiracy as alleged in Paragraphs 5.1 and 6.57 of the Amended Indictment, which remain unchallenged by the Defence. The Prosecution further submits that Sylvain Nsabimana had hierarchical authority over all civil servants and all persons holding public office within the boundaries of the *Préfecture*, as alleged in Paragraph 3.5 of the Amended Indictment, which is not challenged by the Defence.

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[21] T. 16 February 2004, p. 42 (TCS).
[22] Prosecution Exhibit P 110, p. 23.
[23] Prosecution Exhibit P 136, p. 131.
[24] Prosecution Exhibit P113, p. 7.
[25] T. 9 June 2004, p. 43.

48. In its Reply, the Defence for Nsabimana makes the following submissions:

- Paragraph 6.26: The Defence submits that Prosecution Witness RV's testimony refers to a meeting chaired by Sylvain Nsabimana, which has no relation to facts pleaded in the Paragraph. There is also no evidence that Sylvain Nsabimana was aware of the massacres and decided not to stop them. The Defence submits that, while Prosecution Expert Witness Guichaoua admitted that he had no transcript of the 20 April 1994 meeting, Prosecution Expert Witness Des Forges referred in her Report to notes taken by one of the participants. However, those notes were never tendered as exhibits, even though they were the only reliable evidence about this meeting.

- Paragraph 6.28: The Defence submits that evidence relied on by the Prosecution does not relate to the specific facts pleaded in this paragraph of the Amended Indictment.

- Paragraphs 6.51 and 6.52: The Defence submits that no evidence was adduced that Pauline Nyiramasuhuko and Arsène Shalom Ntahobali were among Sylvain Nsabimana's subordinates in accordance with Paragraph 3.4 of the Amended Indictment.

- Paragraph 6.55: The Defence submits that what is at stake is not the context of the crimes, but whether the alleged facts are proven or not.

- Paragraph 6.56: The Defence submits that no evidence was adduced that soldiers and militiamen were among Sylvain Nsabimana's subordinates.

*IV. **Submissions of the Parties on Kanyabashi's Motion***

Rule 98bis Standards

49. After its review of both the ICTR and the ICTY jurisprudence on Rule 98*bis*, the Defence for Joseph Kanyabashi submits that the relevant criterion is whether or not the evidence adduced by the Prosecution, if believed, is sufficient to sustain a conviction by a reasonable trier of fact. The Defence further submits that the Trial Chamber may, in accordance with Rule 98*bis* acquit an Accused with regard to an entire count of the indictment or with regard to a factual incident or event which is cited in the indictment in support of the offence.

50. In its Response, the Prosecution agrees with the Defence analysis of jurisprudence under Rule 98*bis*, but submits that while the Trial Chamber may acquit when the applicable criteria are met, it is not obliged to do so, and can wait until it has heard the whole evidence before coming to such a decision.

Acquittal on Miscellaneous Charges Pleaded in the Amended Indictment

51. The Defence requests Joseph Kanyabashi's acquittal under Rule 98*bis* on charges pleaded in the following paragraphs of the 8 June 2001 Amended Indictment:

- Paragraph 6.26: The Defence submits that the Prosecution failed to give evidence on this paragraph. The Defence submits that the only *conseiller* whose dismissal was reported in the Prosecution case was someone called Said, who was, according to Prosecution Witness QA, replaced by Jacques Habimana. However, there was no evidence that Joseph Kanyabashi dismissed him.

- Paragraphs 6.37 and 6.38: The Defence submits that no Prosecution witness testified on the events alleged in those two Paragraphs.

- Paragraph 6.41: The Defence submits that this paragraph relates to two series of events, namely the transfer of refugees from the prefectoral office to Nyange and the selection of refugees to be led from the prefectoral office to the woods neighbouring the EER. According to the Defence, the paragraph alleges that some of the refugees who came back from Nyange to the prefectoral office were subsequently selected and led to the woods. The Defence submits that the only witness who testified on events at EER that involved Joseph Kanyabashi is Prosecution Witness QI, who testified about the selection of refugees at EER who were led to the neighbouring woods. This event is different from the one pleaded in the Indictment. The Defence adds that the Prosecution opted not to call Prosecution Witness RM whose statement disclosed in the supporting materials referred to the specific events pleaded in Paragraph 6.41. Therefore, the Defence submits that the Prosecution did not give *prima facie* evidence that Joseph Kanyabashi abducted refugees at the prefectoral office to be taken to the woods next to EER.

- Paragraph 6.43: The Defence submits that the Prosecution failed to adduce evidence in relation to the acts pleaded in this paragraph.

- Paragraph 6.45: The Defence submits that the Prosecution failed to adduce evidence as regards events that allegedly occurred on 21 April in Butare and in June near the Butare market. This submission does not extend to events that allegedly occurred in Save in late April as pleaded in the Paragraph.

- Paragraph 6.57: The Defence submits that the events are related to Accused Alphonse Nteziryayo only and that the Prosecution failed to adduce evidence that Joseph Kanyabashi was involved in the events pleaded in this paragraph.

- Paragraph 6.63: The Defence submits that, in accordance with Paragraph 6.32 of the Indictment, subordinates of Joseph Kanyabashi were *conseillers* and communal policemen. The Prosecution failed to adduce evidence that Joseph Kanyabashi had authority over those who allegedly committed the crimes pleaded in this paragraph, namely soldiers, militiamen and gendarmes.

52. In its Response, the Prosecution makes the following submissions:

- Paragraph 6.26: The Prosecution relies on the testimonies of Prosecution Witness QA and Prosecution Expert Witness Guichaoua to submit that sufficient evidence was adduced in support of this paragraph.

- Paragraphs 6.37 and 6.38: The Prosecution relies on page 38 of the Report of Prosecution Expert Witness Alison Des Forges that was admitted as evidence under Prosecution Exhibit Number 110A, and submits that the Expert Witness was not cross-examined on this point.

- Paragraph 6. 41: The Prosecution submits that it is not appropriate to eliminate parts of a paragraph, especially where there is evidence to support the other parts of the paragraph. Relying in particular on Prosecution Witness QY's testimony, the Prosecution further submits that there is ample evidence from witnesses that the Accused was present and therefore consented to the order to remove forcibly the refugees from the prefectoral Office and transfer them to Nyaruhengeri.

- Paragraph 6.43: The Prosecution concedes that there is no direct evidence of Joseph Kanyabashi saying to *Préfet* Sylvain Nsabimana at a meeting in June 1994 that all the Tutsi refugees at the *préfecture* should be eliminated. However, relying in particular on the testimonies of Prosecution Witnesses SS and SU, the Prosecution submits that there is ample evidence that Joseph Kanyabashi attended meetings at the *préfecture* office, and that he was present when the refugees were being forced into buses at the *préfecture*.

- Paragraph 6.45: The Prosecution submits that there is ample evidence that between 20 April and June 1994, the Accused encouraged and instructed soldiers, militiamen and civilians to search for and exterminate Tutsi who escaped the massacres. The Prosecution relies in particular on testimonies of Prosecution Witnesses QA, QAM and Prosecution Expert Witness Alison Des Forges. Moreover, the Prosecution submits that no part of the Indictment ought to be eliminated because of a lack of precision.

- Paragraph 6.57: The Prosecution concedes that it has not led evidence against Joseph Kanyabashi relating to the hotel referred to in this paragraph, but submits that Alphonse Nteziryayo is charged as a co-conspirator together with Joseph Kanyabashi as mentioned in Paragraph 5.1 of the Amended Indictment. The Prosecution further argues that this paragraph should not be removed simply because there is no mention of Joseph Kanyabashi.

- Paragraph 6.63: The Prosecution submits that there is ample evidence relating to crimes of a sexual nature committed by Joseph Kanyabashi's subordinates, including communal policemen and civilians, as stated in Paragraph 3.5 of the Amended Indictment. The Prosecution relies in particular on testimony by Prosecution Witness SS.

53. The Prosecution finally submits that it has conclusively established a *prima facie* case against the Accused in respect of all the Counts and that it is now incumbent upon the Defence to answer the charges against the Accused. The Prosecution further submits that it is inappropriate and erroneous for the Defence to make submissions of vagueness or lack of specificity of the Indictment in a Rule 98*bis* Motion.

54. In its Reply, the Defence makes the following submissions:

- Paragraph 6.26: The Defence challenges the Prosecution Case regarding Joseph Kanyabashi's involvement in *conseiller* Said's abduction and murder and submits that neither Prosecution Witness QA nor Prosecution Expert Witness Guichaoua were conclusive on this point.

- Paragraphs 6.37 and 6.38: The Defence replies to the Prosecution submission that Expert Des Forges was not cross-examined on this point by stressing that the examination-in-chief also failed to address this issue.

- Paragraph 6.41: The Defence disputes the Prosecution Response that it is not appropriate to eliminate parts of a paragraph and relies on the *Kvocka* Decision (TC). The Defence further submits that Prosecution Witness QY never identified the Accused.

- Paragraph 6.43: The Defence challenges the Prosecution submission that Joseph Kanyabashi's guilt under Paragraph 6.43 can be inferred from evidence of his involvement in the event pleaded under Paragraph 6.41 as regards Nyange.

- Paragraph 6.45: The Defence stresses that this paragraph refers only to events that allegedly occurred in Butare city, Ngoma *commune*. The Defence submits that Prosecution Witness QA testified about events that occurred in Ngoma *secteur* and that Prosecution Witness QAM gave evidence on events which took place in Kabakobwa, on the border between Nkubi and Sahera *secteurs* and are pleaded in Paragraphs 6.32 and 6.33 of the Amended Indictment. The Defence adds that the letter referred to by Expert Witness Des Forges did not mention Butare on 21 April or the Butare Market in June. Therefore, the evidence on which the Prosecution relies is irrelevant and does not support the events pleaded in Paragraph 6.45.

- Paragraph 6.57: The Defence submits that Joseph Kanyabashi is charged under Article 6(3) of the Statute on the facts pleaded in this paragraph. However, the Prosecution failed to adduce evidence that Alphonse Nteziryayo and Robert Kajuga were his subordinates.

- Paragraph 6.63: Joseph Kanyabashi is charged under Article 6(3) of the Statute on the facts pleaded in this paragraph. The testimony of Prosecution Witness SS, on which the Prosecution relies, does not involve Ngoma communal policemen nor *conseillers de secteur*, who are the only subordinates of Joseph Kanyabashi. The Prosecution failed to adduce evidence involving his subordinates.

V. Submissions of the Parties on Ndayambaje's Motion

55. The Defence notes that 14 witnesses testified for the Prosecution against the Accused: QAR, TO, QAQ, QAF, FAL, TP, TW, RV, QBZ, QAL, EV, FAG, FAU and RT, as well as four expert witnesses.

Preliminary Issue: Deletion of Introductory Formulation to Each Count

56. As a preliminary issue, the Defence for Elie Ndayambaje submits that all Counts in the Amended Indictment are preceded by the following sentence: "By the acts or omissions described in Paragraph 5.1 to 6.54 and more specifically in the Paragraphs referred to below". The Defence recalls that, in a Decision rendered on 31 May 2000 against Joseph Kanyabashi,[26] the Chamber ruled that a similar introductory formulation to each Count should be deleted. Relying on a Decision issued on 23 May 2002 in the *Military I* Case,[27] the Defence submits that this ruling of 31 May 2000 should also apply to Elie Ndayambaje, so that each Count refer only to the Paragraphs of the Amended Indictment that are specifically referred to in its description.

[26] *Prosecutor v. Kanyabashi*, ICTR-96-15-I, Decision on the Defence Preliminary Motion for Defects in the form of the Indictment (TC), 31 May 2000.
[27] *Prosecutor v. Bagosora et al.(Military I)*, ICTR-98-41-T, Decision on Defence Motions of Nsengiyumva, Kabiligi and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion (TC), 23 May 2002.

57. The Prosecution responds that the *Military I* Decision the Defence relies upon is to the effect that a Trial Chamber should only extend a remedy to co-accused where similar reasons exist. The Prosecution submits that, while the *Military I* Decision applies to remedies of a procedural nature, the issue in the present request goes to the essence of the Prosecution Case. Defects in the form of the Indictment are to be raised in a preliminary motion and cannot, in any case, be raised in a Motion for acquittal under Rule 98*bis*.

58. In its Reply, the Defence makes the same submissions as in the Motion.

Acquittal on Count 1 (Conspiracy to Commit Genocide)

59. The Defence requests Elie Ndayambaje's acquittal on Count 1 (Conspiracy to Commit Genocide). The Defence submits that the Prosecution failed to adduce evidence that Elie Ndayambaje met, discussed or even knew his alleged co-conspirators Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Joseph Kanyabashi, Ladislas Ntaganzwa and Arsène Shalom Ntahobali. Although evidence was adduced that Elie Ndayambaje knew Alphonse Nteziryayo, this evidence does not establish that they made an agreement for the commission of the acts described in Count 1. The Defence relies on the separate opinions of Judges Ostrovsky and Williams in the Oral Decision rendered by Trial Chamber III in the *Cyangugu* Case on 6 March 2002[28] and the *Musema* Judgment (TC) to say that the Prosecution should have adduced evidence as to the other persons that the Accused conspired with, as well as when and where such an agreement was discussed and concluded.

60. In its Response, the Prosecution refers to its opening address where it stated that Butare authorities, and in particular Sylvain Nsabimana and Joseph Kanyabashi, as well as other *bourgmestres* like Elie Ndayambaje not only understood the message of President Sindikubwabo, but expressed their desire to organise in Butare the same activities that occurred in the other *préfectures*. The Prosecution submits that there is sufficient evidence of the actions of the Accused from which the Trial Chamber can infer that there was an agreement between the Accused and at least one of the other named persons, without needing proof that the Accused knew each and every one of his co-conspirators. The Prosecution relies on the Joinder Decision in which the Trial Chamber found that "sufficient elements of each charge have been established to show probability that the Accused participated in a common scheme, strategy or plan with one another or that they conspired to commit genocide".[29] Relying on the findings in *Niyitegeka* Judgment (TC), the Prosecution submits that sufficient evidence was adduced that Elie Ndayambaje conspired with Alphonse Nteziryayo to kill the Tutsi: the Prosecution refers in particular to Prosecution Witnesses TO, QAF, QAR, RV and Prosecution Expert Witness Guichaoua's Report.

61. In its Reply, the Defence submits that the Prosecution reference to its opening address cannot replace the lack of evidence. The Defence challenges the relevance of the *Niyitegeka* judgment to the present case. The Defence notes that, according to the Prosecutor's Response, the Conspiracy began on the day of Elie Ndayambaje's swearing-in ceremony,

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[28] *Prosecutor v. Ntagerura et al.(Cyangugu)*, ICTR-99-46-T, Oral Ruling (TC), T. 6 March 2002, p. 53-54; Separate Opinion of Juge Ostrovsky, T. 6 March 2002, p. 58-60; Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgment of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98*bis*, 13 March 2002.

[29] *Prosecutor v. Nyiramasuhuko et al.*, ICTR-97-21-I, ICTR-97-29A/B-I, ICTR-96-15-T, ICTR-96-8-T, Decision on the Prosecutor's Motion for Joinder of Trials (TC), 5 October 1999, Paragraph 13.

namely at the end of June 1994, but that, at the same time, the Prosecution tried to present as evidence of this alleged conspiracy, events that occurred before this date. Elie Ndayambaje's alleged membership of the MRND Party was not proved.

Acquittal on Miscellaneous Charges Pleaded in the Amended Indictment

62. The Defence requests Elie Ndayambaje's acquittal on the following Paragraphs of the Amended Indictment:

- Paragraphs 5.1 and 6.54: These Paragraphs refer directly to Count 1. Therefore, the Defence requests the acquittal for the same reasons as developed for the acquittal on this Count.
- Paragraphs 5.8 and 6.28: The Prosecution failed to adduce evidence of the presence of Elie Ndayambaje at the 19 April 1994 meeting. It also failed to prove that Elie Ndayambaje's appointment as *bourgmestre* was linked to the meeting.
- Paragraph 5.13: The Prosecution failed to adduce evidence that Elie Ndayambaje ever distributed weapons in Butare.
- Paragraphs 6.34, 6.36: The Prosecution failed to adduce evidence in relation to facts pleaded in those paragraphs.
- Paragraph 6.37: This paragraph is vague and redundant in relation to Paragraphs 6.30 to 6.33.
- Paragraph 6.38: The date mentioned in this paragraph is erroneous and the events related have no bearing on the crimes pleaded in the Amended Indictment.
- Paragraph 6.39: This paragraph lacks temporal and geographic specificity.
- Paragraphs 6.50 to 6.53: Those paragraphs do not mention the Accused.

63. In its Response, the Prosecution makes the following submissions:

- Paragraph 5.1: The Prosecution submits that this paragraph deals with the Count of Conspiracy to Commit Genocide and relies on its submissions in relation to this Count.
- Paragraph 5.8: The Prosecution relies on the testimonies of Prosecution Witnesses QAR, TO, QAQ, QAF, TO, TP, RV and FAL who all gave evidence about the inflammatory nature of Elie Ndayambaje's speech at his re-installation.
- Paragraph 5.13: The Prosecution relies on Prosecution Witness QAR's testimony to submit that there is ample evidence that Elie Ndayambaje distributed weapons.
- Paragraph 6.28: The Prosecution refers to the testimonies of Prosecution Witnesses QAR and RV who gave evidence that, although Elie Ndayambaje had officially resigned from his position as *Bourgmestre* before April 1994, he continued to have a role in the *commune*.
- Paragraphs 6.36 to 6.39: The Prosecution submits that evidence was adduced in relation to these Paragraphs without further details.

- Paragraphs 6.50 to 6.54: The Prosecution submits that the *Butare* Case is a joint one and that, because of the nature of the charges, even paragraphs which do not mention the name of the Accused have a bearing on his case. The Prosecution adds that some Paragraphs provide a factual background through which the Prosecution has presented the case in a holistic and comprehensive manner. Therefore, the Prosecution submits that those paragraphs which do not mention the Accused shall continue to be held as worthwhile material with which the Chamber could analyse all the evidence.

64. In its Reply, the Defence challenges the way the Prosecution relies on the testimonies of Prosecution Witnesses, in particular Prosecution Expert Witness Shukry, Prosecution Witnesses FAU, TO, TP, RT and QBZ. The Defence submits that the Prosecution failed to adduce evidence or give any explanation as regards Paragraphs 6.36 to 6.39 and that Paragraphs 6.50 to 6.54 do not involve Elie Ndayambaje.

Credibility and Reliability of Prosecution Witness QAR

65. The Defence asks the Trial Chamber to consider that the testimony of Prosecution Witness QAR in relation to events that allegedly occurred on or about 20 April 1994 at Mugombwa Church, is not credible or reliable, and that the Defence needs not respond to the allegations it contains. The Defence stresses that Prosecution Witness QAR's testimony contained a lot of discrepancies and was therefore unreliable and not credible. Moreover, this testimony was never corroborated. Relying on the jurisprudence, the Defence submits that Prosecution Witness QAR's testimony meets the criteria of lack of credibility and reliability for acquittal under Rule 98*bis*, but that the Chamber cannot acquit Elie Ndayambaje on the events alleged in this testimony since they are not pleaded in the Indictment.

66. In its Response, the Prosecution submits that Mugombwa Church, on which Prosecution Witness QAR testified, is in Muganza province and that the events that occurred in this place therefore fall within the scope of Paragraph 6.37 of the Amended Indictment. The Prosecution relies on a Decision rendered on 6 February 2002 in the *Kamuhanda* Case[30] to submit that, even if Mugombwa Church is not referred to in the Amended Indictment, the place is located in Muganza *commune*, a place for which the Accused was given notice of offences. The Prosecution further submits that the absence of mention of Mugombwa Church in the Amended Indictment was cured by the timely disclosure of Prosecution Witness QAR's statements.

67. As regards Prosecution Witness QAR's credibility and reliability, the Prosecution admits that the witness did tend to get confused about the exact chronology of events, but stresses that the witness was very clear about the salient points so that it cannot be inferred that the evidence of this witness broke down. The Prosecution adds that Witness QAR's testimony was corroborated by Prosecution Witnesses RV and FAU. The Prosecution further submits that the final determination as to the weight to be attached to this evidence should be made at the end of the case.

68. In its Reply, the Defence stresses the Prosecution admission that Prosecution Witness QAR did tend to get confused. The Defence submits that the evidence of this witness has completely broken down.

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[30] *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Decision on the Prosecutor's Motion to Add Witnesses (TC), 6 February 2002.

DELIBERATIONS

69. The Chamber notes that each of the Motions is brought pursuant to Rule 98*bis* which provides:

> If after the close of the case for the Prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the Indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

70. The Chamber relies on the interpretation of Rule 98*bis* made by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") in the *Jelisic* Judgment:[31]

> The reference in Rule 98*bis* to a situation in which 'the evidence is insufficient to sustain a conviction' means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt [...]: '[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question'.[32] The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.

71. It is clear from the judgement that the scope of Rule 98*bis* is delimited in relation to the determination of whether the evidence, if believed, is insufficient to sustain a conviction on one or more counts of the Indictment. Three situations may occur:

> a) Where some evidence was adduced and that evidence, if believed, could be sufficient for a reasonable trier of fact to sustain, beyond reasonable doubt, a conviction on the particular Count or charge in question, a Rule 98*bis* acquittal shall be denied. The sufficiency of the evidence shall be determined without prejudice to the assessment of the reliability and credibility of the available evidence, which is itself to be made at the end of the Trial in light of all the evidence adduced.

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[31] *Prosecutor v. Jelisic*, IT-95-10-A, Appeal Judgment (AC), 5 July 2001, Paragraph 37. Quoted in *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Defence Motion for a Judgment of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment (Article 98*bis* of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a Judgment of Acquittal (TC) (the "*Semanza* Decision"), 27 September 2001, Paragraph 14; *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98*bis* (TC)(the "*Kamuhanda* Decision"), 20 August 2002, Paragraph 18.

[32] *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgment (AC), 20 February 2001, Paragraph 434.

b) An exception to the rule that the Chamber should not assess the reliability and credibility of the evidence when seized under Rule 98*bis* is a case where "the only relevant evidence when viewed as a whole is so incapable of belief that it could not properly support a conviction, even when taken at its highest for the Prosecution".[33] In these circumstances, the Chamber shall order the entry of judgement of acquittal.

c) Where no evidence was adduced in relation to a count or a charge referred to by the Defence, acquittal shall be granted.

It is important to note that it does not follow that non-acquittal under a Rule 98*bis* motion will necessarily ultimately result in a conviction on the count or the charge at the end of the trial. Even if the Defence fails to adduce exculpatory evidence, the assessment of the evidence in its totality at the end of the trial is different from the evaluation of its sufficiency under Rule 98*bis*.

72. Therefore, in reaching its decision on these Motions, the Chamber will primarily limit its determination to the issue of sufficiency of the evidence adduced in the course of the Prosecution case. Other issues that go beyond the scope of Rule *98bis* are discussed herein below.

Issues That Fall Beyond the Scope of Rule 98bis: Form and Alleged Defects of the Indictment

73. As stated in the *Semanza* Decision of 27 September 2001,[34] any determination relating to potential defects in the indictment is beyond the scope of Rule 98*bis*:

> Pleas for quashing the indictment cannot be raised under Rule 98*bis*. Whatever defects the Defence perceived in the form of the indictment, such as its claim that the charges in the indictment are vague or in contradiction to the indictment and the supporting materials, were to be raised under Rule 72 within the time limits prescribed therein. It is wholly unacceptable to raise such matters half-way through the trial.

74. This Chamber is persuaded by this reasoning and consequently finds that the following requests made by the Defence are related only to the form or to the alleged defects of the Amended Indictments and that they are therefore beyond the scope of Rule 98*bis*:

1. Findings on Nyiramasuhuko's Motion:

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[33] *Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98*bis*, 21 June 2004 (the "*Strugar* Decision on Rule 98*bis*"), Paragraph 18.

[34] *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Defence Motion for a Judgment of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment (Article 98*Bis* of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a Judgment of Acquittal (TC), 27 September 2001 ("Semanza Decision on Rule 98*bis*"), Paragraph 18. See also *Prosecutor v. Ntagerura/Bagambiki/Imanishimwe ("Cyangugu")*, ICTR-99-46-T, Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgment of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule *98Bis* (TC), 13 March 2002, Paragraph 6; *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-T, Decision on Defence Motions for Judgment of Acquittal (TC), 6 April 2000, Paragraph 15.

- Paragraphs 5.1, 6.20, 6.22 and 6.33 of the Amended Indictment as pleaded in relation to Count 4: The Chamber notes that the only submission of the Defence under those paragraphs is that they do not reflect the elements of the crime of Incitement;

- Paragraphs 6.38 and 6.47 of the Amended Indictment as pleaded in relation to Count 4: The Chamber notes that the only submission of the Defence under those paragraphs is their alleged lack of specificity;

- Paragraph 6.21 of the Amended Indictment: The Defence submits that the evidence adduced does not reflect the same order of speakers as in this paragraph. The Chamber finds that this alleged discrepancy in the Paragraph does not affect the evidence that was admittedly adduced as regards the facts to which it relates;

- Paragraph 6.47 of the Amended Indictment: The Chamber notes that the only submissions of the Defence relate to the alleged vagueness of the Paragraph and the fact that it relates to no constitutive element of the crimes;

- Paragraph 6.50 of the Amended Indictment: The Chamber notes that the only submission of the Defence relates to an alleged vagueness of the Paragraph.

2. Findings on Ntahobali's Motion:

- Request for acquittal on Paragraphs 6.51 and 6.53 of the Amended Indictment: The Chamber notes that the only submissions of the Defence in relation to these paragraphs are that they are vague.

3. Findings on Nsabimana's Motion:

- Count 9 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II): The only submission of the Defence is that there is an alleged discrepancy between this paragraph and Paragraph 2.6 of the Amended Indictment.

4. Findings on Ndayambaje's Motion:

- Deletion of introductory formulation to each Count: These submissions relate directly to the form of the Amended Indictment;

- Paragraphs 6.37, 6.38, and 6.39 of the Amended Indictment: The only submissions of the Defence under these Paragraphs go to their lack of the required specificity.

- Events at Mugombwa Church: In relation to Prosecution Witness QAR's testimony, the Defence submits that those events are not pleaded in the Indictment.

75. Thus, the Chamber dismisses the Motions insofar as they relate to those points which the Chamber has found to pertain to the form and alleged defects of the Amended Indictments which should not be considered at this stage of the proceedings pursuant to Rule 98*bis*.

Issues That Fall Beyond the Scope of Rule 98bis: Reliability and Credibility of Evidence

76. As stated in the *Kordic and Cerkez* Decision of 6 April 2000:[35]

> Generally, the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98*bis*, leaving those matters to the end of the case. However, there is one situation in which the Chamber is obliged to consider such matters; it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case.

77. The Chamber sees no reason to depart from this jurisprudence. Requests for acquittal based on the lack of reliability and/or credibility of the evidence adduced are different from those based on lack of sufficiency. Rather than submitting that the available evidence, even if believed, is not sufficient to sustain a conviction, the Defence admits that some evidence was adduced but submits that it is not reliable and/or not credible. Such a submission is not appropriate under Rule 98*bis*. The only submission relating to reliability and/or credibility that is relevant under Rule 98*bis* would be that the evidence is insufficient because it suffers such a lack of reliability or credibility that the Prosecution case has broken down during its presentation or as a result of cross-examination.

78. Bearing the above principles in mind, the Chamber has examined the following requests and considers that the Defence has failed to demonstrate that the alleged lack of credibility or reliability of the evidence was such that it left the Prosecution without a case :

1. Findings on Nyiramasuhuko's Motion:

- Paragraph 6.14 of the Amended Indictment as pleaded in support of Count 1: The Defence admits that evidence on those facts was adduced by Prosecution Expert Witnesses Des Forges and Guichaoua, but challenges their credibility. The Chamber considers that the cross-examination of those witnesses did not leave the Prosecution without a case.

- Request for acquittal on Paragraphs 1.19 and 6.33 of the Amended Indictment as pleaded in support of Count 1 (Conspiracy to Commit Genocide): The Defence admits that evidence on those facts was adduced by Prosecution Witness RE, but challenges his credibility. In the view of the Chamber, the cross-examination of that witness did not leave the Prosecution without a case.

- Paragraph 6.32 of the Amended Indictment as pleaded in support of Count 1: The Defence admits that evidence on those facts was adduced by Prosecution Witness SJ, but challenges her credibility. In the view of the Chamber, the cross-examination did not leave the Prosecution without a case.

- Paragraphs 1.16 and 5.7 of the Amended Indictment: The Defence admits that evidence on those facts was adduced by Prosecution Expert Witness Des Forges, but

[35] ICTY, *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Decision on Defence Motions for Judgment of Acquittal (TC), 6 April 2000, Paragraph 28. Quoted in the *Semanza* Decision on Rule 98*bis*, Paragraph 17 and *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98*bis* (TC), 20 August 2002 ("*Kamuhanda* Decision on Rule 98*bis*"), Paragraph 19.

challenges her credibility. In the view of the Chamber, the cross-examination of that witness did not leave the Prosecution without a case.

- Paragraph 6.32 of the Amended Indictment: As mentioned in support of Count 1, the Defence admits that evidence was adduced and the Chamber considers that the cross-examination did not leave the Prosecution without a case.

- Request of acquittal on Paragraph 6.33 of the Amended Indictment: The Defence admits that evidence on those facts was adduced by Prosecution Witness RE, but challenges his credibility. The Chamber considers that the cross-examination of that witness did not leave the Prosecution without a case.

2. Findings on Nsabimana's Motion:

- Request for acquittal on Count 6 (Extermination as a Crime Against Humanity): In its Reply, the Defence admits that evidence was adduced by several Prosecution Witnesses in relation to the relevant facts, but submits that it was not direct evidence and challenges its reliability. The Chamber considers that the evidence adduced, for example that of Prosecution Witnesses QBQ and TK, did not leave the Prosecution without a case.

- Request for acquittal on Paragraph 6.26 of the Amended Indictment: The Defence submits that Prosecution Expert Witness Des Forges referred to notes taken by one of the participants during the meeting of all *bourgmestres* of the *Préfecture* allegedly called by Sylvain Nsabimana in the days following his taking of office and that those notes, which were the only reliable evidence of this meeting, were never presented as Exhibits. The Chamber notes that the Defence admits that evidence of this meeting was adduced by the Prosecution and considers that those submissions relate to reliability and credibility of the evidence which shall not be considered under Rule 98*bis*.

3. Findings on Ndayambaje's Motion:

- Submissions on Prosecution Witness QAR's lack of credibility and reliability: In the view of the Chamber, neither the examination-in-chief nor the cross-examination of Prosecution Witness QAR left the Prosecution without a case.

79. For the above reasons, the Chamber dismisses those parts of the Motions, which the Chamber has found to relate to issues of reliability and credibility that may not be dealt with at this stage of the proceedings pursuant to Rule 98*bis*.

Issues That Fall Beyond the Scope of Rule 98bis: Acquittal on Paragraphs of the Indictment Not Relating to the Accused

80. The Chamber considers that paragraphs of the Amended Indictments which present the context of the events that occurred, but which do not mention the Accused, fall outside the scope of Rule 98*bis* which provides only for acquittal on "counts charged in the indictment". There would be no point acquitting an accused in relation to a paragraph that does not mention him or her: the substance of those paragraphs may be true, even if the

accused played no role in the events to which they relate. That is not to say that those paragraphs are irrelevant, as they may be considered at a later stage to highlight the context of the alleged crimes.

81. Several requests for acquittal in relation to paragraphs which do not mention the Accused are made, which the Chamber considers as falling outside the scope of Rule 98*bis*:

1. Findings on Nyiramasuhuko's Motion:

- Paragraphs 1.13 to 1.21, 1.24, 1.26 to 1.30: Those paragraphs are part of the first Section of the Amended Indictment, that is entitled "Historical Context". As such, they refer only to the historical context of the charges.
- Paragraph 5.2: This paragraph refers to information received by UNAMIR on a plan to exterminate the Tutsi and their "accomplices".
- Paragraph 5.3: This paragraph refers in general terms to the incitement to ethnic hatred and violence.
- Paragraph 5.9: This paragraph refers to the creation of youth wings by MRND and CDR.
- Paragraph 5.11: This paragraph refers to the MRND decision to provide support, military training and weapons to those members of the *Interahamwe* most devoted to the extremist cause.
- Paragraph 5.13: This paragraph refers to the distribution of weapons to militiamen and other selected civilians in Butare.
- Paragraph 5.14: This paragraph refers to the establishment of lists of people to be exterminated.
- Paragraph 5.15: This paragraph refers to the use of the lists mentioned in Paragraph 5.14 during the massacres.
- Paragraph 5.16: This paragraph refers to the previous massacres in Kibilira, Bugesera and those of the Bagogwe.
- Paragraph 6.4: This paragraph refers to the killings of Prime Minister Agathe Uwilingiyimana, important opposition leaders and ten Belgian para-commandos from UNAMIR on 7 April 1994.
- Paragraph 6.9: This paragraph refers to the massacres of Tutsi and the murder of numerous political opponents after 6 April and mentions that in Butare *Préfecture*, apart from a few exceptions, the massacres did not start until 19 April 1994.
- Paragraph 6.10: This paragraph refers to the Interim Government's support for the extermination of the Tutsi.
- Paragraph 6.17: This paragraph refers to the expansion of the massacres of the Tutsi population and the murder of moderate Hutu throughout the country by local civil and military authorities and militiamen.
- Paragraph 6.23: This paragraph refers to the arrival of Presidential Guard and Para-Commando Battalion soldiers in Butare and their alleged participation in the massacres.

- Paragraph 6.24: This paragraph refers to the reinforcement of local militiamen in Butare by *Interahamwe* from outside the *Préfecture*.

- Para. 6.44: This paragraph refers to the *Bourgmestre* of Nyakizu's speech calling on the civilians to eliminate all the Tutsi in the *secteur* during the week following President Habyarimana's death.

- Paragraph 6.45: This paragraph refers to the attack of Tutsi refugees in Cyahinda Parish.

2. Findings on Nsabimana's Motion:

- Paragraph 6.33: This paragraph refers to acts allegedly committed by Nsabimana's co-Accused Alphonse Nteziryayo, together with Arsène Shalom Ntahobali.

- Paragraphs 6.51 and 6.52: These paragraphs refer to acts allegedly committed by Accused Pauline Nyiramasuhuko and Arsène Shalom Ntahobali.

- Paragraphs 6.55 and 6.56: Those paragraphs refer to events that allegedly occurred between April and July 1994. Those events are elements of the context in which the crimes pleaded in the Indictment were allegedly committed.

3. Findings on Kanyabashi's Motion:

- Paragraph 6.57: This paragraph refers to acts committed by Alphonse Nteziryayo.

4. Findings on Ndayambaje's Motion:

- Paragraph 6.50 to 6.53: These paragraphs refer to events that allegedly occurred between April and July 1994. These events are elements of the context in which the crimes pleaded in the Indictment were allegedly committed.

82. The Trial Chamber dismisses the Motions insofar as they relate to these paragraphs which only address the context of the facts pleaded in the Amended Indictments.

I. Deliberation on Nyiramasuhuko's Motion

83. The Chamber recalls that Nyiramasuhuko's submissions on Paragraphs 6.14, 6.32 and 6.33 as pleaded in support of Count 1, Paragraphs 5.1, 6.20, 6.22, 6.33, 6.38 and 6.47 as pleaded in support of Count 4, Paragraphs 1.13 to 1.21, 1.24, 1.26 to 1.30, 5.2, 5.3, 5.7, 5.9, 5.11, 5.13 to 5.16, 6.4, 6.9, 6.10, 6.17, 6.21, 6.23, 6.24, 6.44, 6.45, 6.47, and 6.50 of the Amended Indictment were dismissed under Paragraphs 75, 79 and 82 of the present Decision, as they fall out of the scope of Rule 98*bis*.

Request for Acquittal on Article 6(3) Charges under Counts 1 to 3 and 5 to 11

84. The Defence submits that Pauline Nyiramasuhuko's *de jure* authority was limited to the staff of her Ministry and that the Prosecution failed to plead and to adduce evidence that she had *de facto* authority over anyone. The Prosecution submits that ample evidence was adduced of Pauline Nyiramasuhuko's authority over the *Interahamwe* and soldiers and relies in particular on the testimonies of Prosecution Witnesses FA, FAP, QBP and QBQ.

85. The Chamber notes that the Amended Indictment charges Pauline Nyiramasuhuko under Articles 6(1) and 6(3) of the Statute on all counts, except Counts 4 and 7. Count 4 (Direct and Public Incitement to Commit Genocide) is brought under Article 6(1) only, and Count 7 (Crime Against Humanity – Rape) is charged under Article 6(3) only.

86. The Chamber recalls Article 6(3) of the Statute, which states that:

> The fact that any of the facts 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.

87. The Chamber recalls the *Kamuhanda* Judgment[36] and the jurisprudence cited therein for the criteria of accountability under Article 6(3) of the Statute:

> The following three concurrent conditions must be satisfied before a superior may be held criminally responsible for the acts of his or her subordinates:
> (i) There existed a superior-subordinate relationship between the person against whom the charge is directed and the perpetrators of the offence;
> (ii) The superior knew or had reason to know that the criminal act was about to be or had been committed; and
> (iii) The superior failed to exercise effective control to prevent the criminal act or to punish the perpetrators thereof.[37]

88. In order to enter an acquittal under Rule 98*bis*, the Chamber should therefore find that the evidence adduced, taken at its highest, is insufficient for a reasonable trier of fact to be persuaded beyond reasonable doubt of one or more of the above mentioned three criteria.

89. With respect to the first criterion, the Chamber notes that evidence was adduced that the massacres in Butare *Préfecture* were committed mainly by or under the authority of agents of the government, namely the *Préfet* and his subordinates, *bourgmestres* and their subordinates, soldiers, gendarmes, *communal* policemen and *Interahamwe*, which were the youth wing of the MRND Party. The Chamber is of the view that evidence was adduced that Pauline Nyiramasuhuko was a Minister of the Interim Government, an influential member of the MRND and that, as such, she had authority over all the above-mentioned persons in Butare *Préfecture*. The Chamber notes that Prosecution Expert Witness Guichaoua, during his testimony, analysed the significance of a note from the alleged diary of Pauline Nyiramasuhuko which mentions the existence of Ministers in charge of monitoring the

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[36] *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Judgment and Sentence (TC)("*Kamuhanda* Judgment (TC)"), 22 January 2004, Para. 603.

[37] *Prosecutor v. Mucic et al. ("Celebici")*, IT-96-21-A, Judgment (AC)("*Celebici* Judgment (AC)"), 20 February 2001, paras. 189-198, 225-226, 238-239, 256 and 263; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Judgment (Reasons)(AC)("*Bagilishema* Reasons (AC)"), 13 December 2002, paras. 26-62.

Préfectures[38] and testified that Pauline Nyiramasuhuko was the one responsible for Butare.[39] The Chamber also notes that several Prosecution witnesses, for example FA,[40] FAP,[41] QBP,[42] QBQ[43] and SS,[44] testified that Pauline Nyiramasuhuko gave orders to soldiers and *Interahamwe* and was obeyed. Consequently, the Chamber is of the view that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt that the Prosecution's case against Nyiramasuhuko could meet the requirements of the first criterion of the test for superior responsibility.

90. As regards the second criterion, i.e. whether the Accused knew or had reason to know that crimes were being committed, the Chamber notes that evidence was adduced that the killings in Butare *Préfecture* were massive and widespread; that several Prosecution witnesses, such as QBP[45] and QBQ[46] testified that Pauline Nyiramasuhuko was involved in some of the attacks; and that she had set up, together with her son Arsène Shalom Ntahobali, a roadblock right in front of their home, where several Prosecution witnesses, for example FA[47] and FAP,[48] testified that people were killed. The Chamber concludes that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's actual knowledge that her subordinates were committing crimes.

91. As regards the last criterion, i.e. whether the Accused failed to exercise effective control to prevent the criminal act or to punish the perpetrators thereof, there is evidence showing that not only did the Accused fail to prevent criminal acts or punish their perpetrators, but that she directly participated in their commission. The killings were massive and widespread in the *Préfecture* and Pauline Nyiramasuhuko and other authorities were in a position to stop the massacres and punish the perpetrators. The Chamber is of the view that this evidence, if believed, could be sufficient for a reasonable trier of fact to be persuaded beyond reasonable doubt that Pauline Nyiramasuhuko did not use her *de jure* or *de facto* authority to prevent or punish the commission of the crimes by her subordinates.

92. Consequently, the Chamber concludes that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to be persuaded beyond reasonable doubt of Pauline Nyiramasuhuko's accountability under Article 6(3) of the Statute for the crimes pleaded in the Amended Indictment. Pursuant to Rule 98*bis*, acquittal is therefore denied on charges pleaded under Article 6(3) of the Statute.

Request for Acquittal on Count 1 (Conspiracy to Commit Genocide)

93. The Defence submits that the Prosecution failed to adduce evidence of the existence of a Conspiracy. Relying on the jurisprudence, the Defence submits that the mere mention of the alleged co-conspirators is not sufficient to convict under this count, and that evidence must be given that the Accused made an agreement with others for the commission of the

[38] Exhibit P136A (Guichaoua's Report), Vol. II, p. 50 (French Version). T. 28 June 2004, p. 73.
[39] T. 28 June 2004, p. 73.
[40] T. 30 June 2004, p. 64 (ICS).
[41] T. 11 March 2003, p. 57.
[42] T. 24 October 2002, p. 85.
[43] T. 3 February 2004, p. 11-12.
[44] T. 3 March 2003, p. 52.
[45] T. 24 October 2002, p. 85.
[46] T. 3 February 2004, p. 12.
[47] T. 30 June 2003, p. 64 (ICS).
[48] T. 11 March 2003 p. 41-42.

crime. The Defence also challenges the responsibility of Pauline Nyiramasuhuko under paragraphs of the Amended Indictment on which the Count relies. The Prosecution responds that all paragraphs of the Amended Indictment on which the Count is based should be considered in their entirety, and not in isolation. The Prosecution submits that sufficient evidence was adduced on this Count and relies, in particular, on Prosecution Witness SJ's testimony, as well as Prosecution Expert Witnesses Des Forges' and Guichaoua's reports and testimonies.

94. The Chamber recalls the definition of Conspiracy to Commit Genocide as given in the *Musema* Judgment and applied in other cases:[49]

> Conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.

95. The Chamber agrees with the Defence that the mere mention of the alleged co-conspirators is not sufficient to enter a conviction[50] and that evidence must be given that the Accused made an agreement with others for the commission of the crime. However, the Chamber recalls the following definition of agreement in the *Media* Judgment:[51]

> The existence of a formal or express agreement is not needed to prove the charge of conspiracy. An agreement can be inferred from concerted or coordinated action on the part of the group of individuals. A tacit understanding of the criminal purpose is sufficient.

96. The *Media* Judgment further states that:[52]

> Conspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework. A coalition, even an informal coalition, can constitute such a framework so long as those acting within the coalition are aware of its existence, their participation in it, and its role in furtherance of their common purpose.
>
> [...] Conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their links with each other. Institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action. The Chamber considers the act of coordination to be the central element that distinguishes conspiracy from "conscious parallelism" [...].

97. It results from this jurisprudence that there are two ways to establish the existence of a conspiracy. The first is to prove the existence of a formal and express agreement for the commission of the crime. In most cases, such a demonstration will be very difficult to make. The second is to adduce evidence of a concerted or coordinated action on the part of the group of individuals, from which a reasonable trier of fact could infer the existence of a

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[49] *Prosecutor v. Musema*, ICTR-96-13-T, Judgment (TC), 27 January 2000, Paragraph 191. See also *Prosecutor v. Ntakirutimana*, ICTR-96-10 & 96-17-T, Judgment (TC),21 February 2003, Paragraph 798; *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgment (TC), 16 May 2003, Paragraph 423; *Prosecutor v. Nahimana, Barayagwiza and Ngeze ("Media")*, ICTR-99-52-T, Judgment (TC), Paragraph 1041; *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment (TC), 1 December 2003, Paragraph 787.

[50] *Kamuhanda* Decision on Rule 98*bis* (TC), *op. cit.*, Paragraph 22-23.

[51] *Media* Judgment (TC), *op.cit.*, Paragraph 1045. See also *Kajelijeli* Judgment (TC), *op. cit.*, Paragraph 787.

[52] *Media* Judgment (TC), *op.cit.*, Paragraph 1047-1048.

conspiracy. Such concerted or coordinated action can be established on the basis of evidence in support of the facts pleaded in the indictment on which the count relies.

98. The Chamber notes that, in support of its Motion for acquittal on Conspiracy, the Defence challenges several paragraphs of the Amended Indictment on which the Count is based. However, it is the view of the Chamber that, before addressing the submissions made by the Defence as regards specific paragraphs, the Chamber should examine the Count of Conspiracy as a whole.[53]

99. The Chamber notes that evidence was adduced by the Prosecution that from 7 April 1994, massacres of the Tutsi population were perpetrated throughout Rwanda. However, with a few exceptions, no such massacres occurred in Butare *Préfecture* until after the replacement of *Préfet* Habyalimana. There is evidence that the replacement of the *Préfet* was part of a common plan adopted at the government level to remove the remaining persons who opposed the massacres in the Butare *Préfecture*. According to the evidence, the swearing-in ceremony of *Préfet* Sylvain Nsabimana on 19 April 1994, which was attended by President Sindikubwabo, Prime Minister Jean Kambanda, Pauline Nyiramasuhuko and several authorities, was the occasion to deliver a clear message that the Interim Government was supporting the massacres. This meeting was the signal that marked the beginning of a coordinated effort to exterminate the Tutsis in the Butare *Préfecture*. If this evidence is believed, especially when considered together with other evidence of her involvement in the killings and the planning thereof, a reasonable trier of fact could conclude that, by her presence at this gathering, Nyiramasuhuko demonstrated her acquiescence to this scheme, even if there is no evidence that she spoke at the meeting. The Chamber also notes that Prosecution Witness FAS testified that he heard Pauline Nyiramasuhuko tell other authorities that she could provide firearms to kill the Tutsi.[54] The evidence also shows that the erection of roadblocks was one of the methods used in the commission of the genocide. Several factual Prosecution Witnesses, for example FA[55] and FAP,[56] testified that Pauline Nyiramasuhuko and her son Arsène Shalom Ntahobali set up and led a roadblock in front of their house, where several people were killed. The Chamber finds that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's participation in a Conspiracy to Commit Genocide.

100. The Defence challenges the responsibility of Pauline Nyiramasuhuko under Paragraphs 5.1, 6.13, 6.14, 6.32, 6.33, 6.39, 6.52, 6.55 and 6.56 of the Amended Indictment, as they are pleaded in support of Count 1. For reasons developed previously, the Chamber dismisses the submissions of the Defence in relation to Paragraphs 6.14, 6.32 and 6.33, in support of Count 4, which are out of the scope of Rule 98*bis* as they are related to the assessment of reliability and credibility of the evidence. The Chamber also notes that Paragraph 6.39 does not appear among the factual paragraphs in support of Count 1. Therefore, the Chamber limits its determination to Paragraphs 5.1, 6.13, 6.52, 6.55 and 6.56 of the Amended Indictment, as they are pleaded in support of Count 1.

101. Paragraph 5.1 of the Amended Indictment alleges that, from late 1990 to July 1994, several personalities conspired among themselves and with others to work out a plan for the extermination of Tutsi and the elimination of the opposition. Prosecution Expert Witness Des

[53] *Kamuhanda* Decision on Rule 98*bis*, *op. cit.*, Paragraph 23.
[54] T. 29 April 2004, p. 23-24.
[55] T. 30 June 2003, p. 64 (ICS).
[56] T. 11 March 2003 p. 41-42.

Forges' Report explains that "the Habyarimana circle was preparing the organization and logistics for attacking the minority" and mentions the recruitment, training and distribution of weapons to militia.[57] Prosecution Expert Witness Guichaoua explained that Pauline Nyiramasuhuko was part of this presidential circle, which ensured her promotion.[58] Expert Guichaoua also testified on the personnel of Pauline Nyiramasuhuko's Ministry, which included several persons known for their extremist views.[59] Referring further to the elements mentioned in support of its determination on Count 1 taken as a whole, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's responsibility under Paragraph 5.1 of the Amended Indictment.

102. Paragraph 6.13 of the Amended Indictment alleges that, between 9 April and 14 July 1994, numerous Cabinet meetings were held, where Ministers were regularly briefed on the situation and demanded weapons for their *préfectures* to be used in the massacres. The Chamber notes that Prosecution Expert Witness Guichaoua's Report presents a non-exhaustive list of Cabinet Meetings attended by Pauline Nyiramasuhuko between 6 April and 18 July 1994.[60] Prosecution Expert Witness Guichaoua also mentioned several notes in the alleged diary of Pauline Nyiramasuhuko which relate to requests for weapons.[61] The Chamber also notes that Prosecution Witness FAS testified that he heard Pauline Nyiramasuhuko tell other authorities that she could provide firearms to kill the Tutsi.[62] The Chamber is of the view that those elements, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's responsibility under Paragraph 6.13 of the Amended Indictment.

103. Paragraph 6.52 of the Amended Indictment alleges that the massacres were the result of a strategy adopted by political, civil and military authorities in the country, at the national as well as local level. The Chamber relies on the same evidence as previously mentioned in relation to Count 1 and finds that those elements, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's responsibility under Paragraph 6.52 of the Amended Indictment.

104. Paragraph 6.55 of the Amended Indictment alleges that, knowing that the massacres were being committed, political and military authorities including Pauline Nyiramasuhuko, took no measures to stop them and refused to intervene to control the population. The Chamber refers to the same evidence as mentioned in support of Paragraph 6.13 and further notes for example that several Prosecution witnesses testified on the killings of people at the roadblock in front of Pauline Nyiramasuhuko's home, notably Prosecution Witnesses FA,[63] FAP,[64] SS,[65] SX,[66] TB,[67] TG,[68] TQ.[69] The Chamber finds that those elements, if believed,

[57] Exhibit P.110 A (Des Forges' Report), p. 6.
[58] T. 25 June 2004, p. 29.
[59] T. 25 June 2004, p. 49-50 ; See French Version, p. 54-55.
[60] Exhibit P. 136 A (Guichaoua's Report), Table 13, p. 145 (French version).
[61] T. 29 June 2004, p. 50-51; See French Version, p. 57.
[62] T. 29 April 2004, p. 23-24.
[63] T. 30 June 2004, p. 64 (ICS).
[64] T. 11 March 2003 p. 41-42.
[65] T. 3 March 2003, p. 26.
[66] T. 27 January 2004, p.15.
[67] T. 4 February 2004, p. 51-53.
[68] T. 31 March 2004, p. 49-50.
[69] T. 7 September 2004, p. 11-12.

could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of the guilt of Pauline Nyiramasuhuko by virtue of Paragraph 6.55 of the Amended Indictment.

105. Paragraph 6.56 of the Amended Indictment alleges that, in concert with others, Pauline Nyiramasuhuko participated in the planning, preparation or execution of a common scheme to commit the crimes pleaded in the above mentioned paragraphs of the Amended Indictment. On the basis of the elements referred to in support of previous paragraphs pleaded under Count 1, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact of the guilt of Pauline Nyiramasuhuko in virtue of Paragraph 6.56 of the Amended Indictment.

106. In light of the evidence adduced in support of Count 1 and its supporting paragraphs, the Chamber dismisses Pauline Nyiramasuhuko's Motion of Acquittal under Rule 98*bis* on this Count.

Request for Acquittal on Count 4 (Direct and Public Incitement to Commit Genocide)

107. The Defence submits that the paragraphs of the Amended Indictment on which Count 4 relies, namely Paragraphs 5.1, 5.8, 5.10, 6.14, 6.20, 6.22, 6.33, 6.38 and 6.47, do not relate to one specific element of the crime of Incitement to Commit Genocide. The Defence adds specific submissions in relation to each paragraph on which Count 4 relies. Relying notably on the evidence led by Prosecution Witnesses FAP, QBP, QBQ, RV, SJ, SS, SU and Expert Guichaoua, the Prosecution responds to the Defence submissions on the specific paragraphs of the Amended Indictment and refers, in particular, to Pauline Nyiramasuhuko's attendance of the meeting of investiture of Elie Ndayambaje as *bourgmestre* of Muganza on 21 June 1994.

108. As a preliminary issue, the Chamber recalls its previous finding with respect to submissions on alleged defects of Indictment and considers that the Defence argument, that the paragraphs of the Amended Indictment on which Count 4 relies do not reflect the specific elements of the crime, is beyond the scope of Rule 98*bis*. The argument is therefore rejected.

109. The Chamber recalls the definition of Direct and Public Incitement to Commit Genocide given in the *Akayesu* Judgment:[70]

> Direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

110. Elements of this definition were thereafter specified in the *Niyitegeka* Judgment:[71]

> The "direct" element "should be viewed in the light of its cultural and linguistic content", noting that "a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience." The Trial Chamber in that case further recalled that "incitement may be direct, and nonetheless implicit."[72] The *mens*

[70] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (TC), 2 September 1998, para. 559.
[71] *Prosecutor v. Nyitigeka*, ICTR-96-14-T, Judgment and Sentence (TC), 16 May 2003, para. 431.
[72] *Akayesu* Judgment (TC), *op. cit.*, para. 557.

> *rea* required for this crime is the intent to directly prompt or provoke another to commit genocide, and the perpetrator must have the specific intent to commit genocide.[73] As it is an inchoate offence, the crime is punishable even where the incitement failed to produce the result expected by the perpetrator.[74]

111. In light of this jurisprudence, it is the view of the Chamber that acquittal, within the terms of Rule 98*bis*, shall be entered where the evidence adduced by the Prosecution taken at its highest is insufficient to prove beyond reasonable doubt that the accused directly incited people to commit genocide, whether through express or implicit speeches, shouting or threats uttered in public places or at public gatherings, or by the use of the media.

112. The Chamber notes that, in support of its Motion, the Defence challenges several paragraphs of the Amended Indictment on which the Count relies. However, it is the view of the Chamber that, before addressing the submissions made by the Defence as regards specific paragraphs, the Chamber should examine the Count of Incitement to Commit Genocide as a whole.

113. The Chamber notes that evidence was adduced of Pauline Nyiramasuhuko's attendance at the swearing-in ceremony of *Préfet* Sylvain Nsabimana on 19 April 1994, where several authorities made speeches directly and publicly inciting the population of Butare *Préfecture* to massacre the Tutsi. Although there is no evidence that Pauline Nyiramasuhuko spoke, the Chamber finds that evidence of her attendance at this meeting, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt that Pauline Nyiramasuhuko aided and abetted in the commission of the crime of Incitement to Commit Genocide. Several Prosecution Witnesses, for example QBP,[75] SJ,[76] SS[77] and TA[78] also testified that Pauline Nyiramasuhuko directly and publicly told soldiers, *Interahamwe* and other people who were at the *Préfecture* office to eliminate the Tutsi refugees who she referred to as "the dirt". The Chamber finds that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's responsibility under Count 4 (Direct and Public Incitement to Commit Genocide).

114. The Defence challenges the responsibility of Pauline Nyiramasuhuko on Count 4 under all the paragraphs on which the Count relies. However, for reasons developed previously in Paragraphs 74-75 of the present Decision, the Chamber dismisses the submissions of the Defence relating to Paragraphs 5.1, 6.20, 6.22, 6.33, 6.38 and 6.47 in support of Count 4, which are out of the scope of Rule 98*bis* as they relate to alleged defects in the Amended Indictment. Therefore, the Chamber limits its determination to Paragraphs 5.8, 5.10 and 6.14.

115. Paragraph 5.8 of the Amended Indictment alleges that, from April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including Pauline Nyiramasuhuko, who publicly incited the people to exterminate the Tutsi population and its accomplices. The Chamber refers to the same evidence mentioned in its determination on Count 4 and finds that this evidence, if believed, could be sufficient for a reasonable trier

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[73] *Ibid.*, para. 560.
[74] *Ibid.*, para. 562.
[75] T. 24 October 2002, p. 85.
[76] T. 28 May 2002, p. 122.
[77] T. 3 March 2003, p. 29.
[78] T. 24 October 2001, p. 108-109.

of fact to be persuaded beyond reasonable doubt of her responsibility under Paragraph 5.8 of the Amended Indictment.

116. Paragraph 5.10 of the Amended Indictment relates to the creation of *Interahamwe* Committees at the *Préfecture* level in June 1993 and the alleged role of Pauline Nyiramasuhuko in Butare as regards *Interahamwe*. The Chamber notes that Prosecution Expert Guichaoua analysed the alleged diary of Pauline Nyiramasuhuko by mentioning a list of several meetings of political mobilisation attended by Pauline Nyiramasuhuko between 6 April and 18 July 1994.[79] In particular, Expert Guichaoua mentioned a meeting with the youth wings of the Parties in Butare on 10 May 1994, which was aimed at implementing in the *Préfecture* the strategy that was decided three days earlier in Kigali.[80] Expert Guichaoua further testified that Pauline Nyiramasuhuko issued orders and organised meetings for the *Interahamwe*.[81] Prosecution Witness FA also testified that several MRND and *Interahamwe* meetings were held at Pauline Nyiramasuhuko's home in Butare, before and after the 6 April 1994,[82] and that an *Interahamwe* whose name was Kazungu told the witness that instructions pertaining to the killing of Tutsi were given during these meetings.[83] The Chamber finds that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's responsibility on the facts pleaded in Paragraph 5.10 of the Amended Indictment.

117. Paragraph 6.14 of the Amended Indictment alleges that Pauline Nyiramasuhuko was the designated Minister responsible for the implementation of the Interim Government's instructions for the perpetration of massacres in Butare *Préfecture*. The Chamber recalls that Prosecution Expert Witness Guichaoua analysed the significance of a note from the alleged diary of Pauline Nyiramasuhuko which mentions the existence of Ministers in charge of monitoring the *préfectures*[84] and explained that Pauline Nyiramasuhuko was the one in charge of Butare *Préfecture*.[85] The Chamber finds that this evidence, if believed, could be sufficient for a reasonable trier of fact to sustain beyond reasonable doubt Pauline Nyiramasuhuko's guilt under Paragraph 6.14.

118. In light of the evidence adduced in support of this Count and its related paragraphs, the Chamber dismisses Nyiramasuhuko's Motion of Acquittal under Rule 98*bis* on Count 4 (Direct and Public Incitement to Commit Genocide).

Request for Acquittal on Counts 10 and 11 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II)

119. Relying on the submissions made in support of acquittal on Counts 10 and 11 in Ntahobali's Motion, the Defence submits that the Prosecution failed to adduce evidence of the first criterion for conviction under those Counts, namely that a non-international conflict existed on the territory of Rwanda.

[79] Exhibit P136A (Guichaoua's Report), Vol. II, p. 24 (French Version).
[80] Exhibit P136A (Guichaoua's Report), Vol. II, p. 42 (French Version). T. 29 June 2004, p. 74.
[81] T. 30 June 2004, p. 32-33.
[82] T. 30 June 2004, p. 65 (ICS).
[83] T. 30 June 2004, p. 51.
[84] Exhibit P136A (Guichaoua's Report), Vol. II, p. 50 (French Version). T. 28 June 2004, p. 73.
[85] T. 28 June 2004, p. 73.

120. The Chamber recalls the finding made in the *Bagilishema* Judgment that, to enter a conviction on Article 4 of the Statute, it must be verified that "Common Article 3 and/or Additional Protocol II applies".[86] Therefore, it is sufficient to demonstrate the applicability of either Common Article 3 of the Geneva Conventions or Additional Protocol II.

121. Criteria for applicability of Common Article 3 of the Geneva Conventions have been set up in the *Akayesu* Judgment:[87]

> The norms set by Common Article 3 apply to a conflict as soon as it is an armed conflict not of an international character. [...] The Appeals Chamber in the Tadic decision on Jurisdiction[88] held "that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached." Similarly, the Chamber notes that the ICRC commentary on Common Article 3[89] suggests useful criteria resulting from the various amendments discussed during the Diplomatic Conference of Geneva, 1949, *inter alia*:
>
> - That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
> - That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
>
> (a) That the *de jure* Government has recognized the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
> (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.

122. In the present case, the Report on the Situation of Human Rights in Rwanda, submitted by Mr Degni-Segui, Special Rapporteur of the Commission for Human Rights, presented by Prosecution Expert Witness Des Forges[90] says that:

> - The party in revolt against the *de jure* Government, namely the Rwandese Patriotic Front (RPF), possessed an organized military force with a responsible authority that was in measure, notably, to answer the Special Rapporteur's investigations,[91] acting within a determinate territory and having the means of

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[86] *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment (TC), 7 June 2001, para. 101. Cited *in Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence (TC), 15 May 2003, para. 357.
[87] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (TC), para. 619.
[88] *Prosecutor v. Tadic*, IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (AC), 2 October 1995, para. 70.
[89] See International Committee of the Red Cross, Commentary I Geneva Convention, Article 3, Paragraph 1 - Applicable Provisions, p. 49-50.
[90] Exhibit P 112a, Commission on Human Rights – Report on the Situation of Human Rights in Rwanda, submitted by Mr Degni-Segui, Special Rapporteur of the Commission for Human Rights under Paragraph 20 of Commission Resolution
[91] *Ibid.*, paragraph 22.

respecting and ensuring the respect of Common Article 3 to the Geneva Conventions.[92]

- The legal Government is obliged to have recourse to the regular military forces, namely the Rwandese Armed Forces (RAF),[93] against insurgents organized as a military force in possession of a part of the national territory.[94]

- That the Security Council of the United Nations had already decided to send the United Nations Mission in Rwanda (UNAMIR) in response to what it considered as a threat to international peace, a breach of peace, or an act of aggression.[95]

123. It is the view of the Chamber that the evidence contained in this Report, if believed, could be sufficient to satisfy beyond reasonable doubt a reasonable trier of fact of the applicability of Common Article 3 of the Geneva Conventions to the present case. Therefore, acquittal of Pauline Nyiramasuhuko on Counts 10 and 11 is denied pursuant to Rule 98*bis*.

Request for Acquittal in Relation to Paragraph 5.1 of the Amended Indictment

124. As mentioned earlier in its determination on Count 1, the Chamber notes that Prosecution Expert Witness Des Forges' Report states that "the Habyarimana circle was preparing the organization and logistics for attacking the minority" and mentions the recruitment, training and distribution of weapons to militia.[96] Prosecution Expert Witness Guichaoua testified that Pauline Nyiramasuhuko was part of this presidential circle, which ensured her promotion.[97] Expert Guichaoua also testified that Pauline Nyiramasuhuko's Ministry featured several persons known for their extremism.[98] Referring further to the elements mentioned in support of its determination on Count 1 taken as a whole, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's responsibility under Paragraph 5.1 of the Amended Indictment. Therefore, acquittal under Rule 98*bis* is denied regarding Paragraph 5.1 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 5.8 of the Amended Indictment

125. As mentioned earlier in its determination on Count 4, the Chamber notes that evidence was adduced that Pauline Nyiramasuhuko attended the swearing-in ceremony of Sylvain Nsabimana on 19 April 1994 and that, on other occasions, she directly and publicly told soldiers, *Interahamwe* and other people at the *Préfecture* office to eliminate the Tutsi refugees who were "the dirt". The Chamber finds that this evidence, if believed, could be sufficient for a reasonable trier of fact to be persuaded beyond reasonable doubt of her responsibility under Paragraph 5.8 of the Amended Indictment. Therefore, acquittal under Rule 98*bis* is denied regarding Paragraph 5.8 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.13 of the Amended Indictment

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[92] *Ibid.*, paragraph 54.
[93] *Ibid.*, paragraph 31, 65.
[94] *Ibid.*, paragraph 22, 35, 49.
[95] *Ibid.*, paragraph 4, 23, 31, 35, 63.
[96] Exhibit P.110 A (Des Forges' Report), p. 6.
[97] T. 25 June 2004, p. 29.
[98] T. 25 June 2004, p. 49-50 ; See French Version, p. 54-55.

126. As mentioned earlier in its determination on Count 1, the Chamber notes that Prosecution Expert Witness Guichaoua's Report presents a non-exhaustive list of Cabinet Meetings attended by Pauline Nyiramasuhuko between 6 April and 18 July 1994.[99] Expert Guichaoua also identified several notes in the alleged diary of Pauline Nyiramasuhuko which relate to requests for weapons.[100] The Chamber also notes that Prosecution Witness FAS testified that he heard Pauline Nyiramasuhuko tell other authorities that she could provide firearms to kill the Tutsi.[101] The Chamber finds that those elements, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of the Pauline Nyiramasuhuko's responsibility under this paragraph. Therefore, acquittal under Rule 98*bis* is denied regarding Paragraph 6.13 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.14 of the Amended Indictment

127. As mentioned earlier in its determination on Count 4, the Chamber notes that Prosecution Expert Witness Guichaoua identified a note from the alleged diary of Pauline Nyiramasuhuko which mentions the existence of Ministers in charge of monitoring the *Préfectures*[102] and testified that Pauline Nyiramasuhuko was the one in charge of the Butare *Préfecture*.[103] The Chamber finds that this evidence, if believed, could be sufficient for a reasonable trier of fact to sustain beyond reasonable doubt Pauline Nyiramasuhuko's guilt under Paragraph 6.14. Therefore, acquittal under Rule 98*bis* is denied regarding Paragraph 6.14 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.30 of the Amended Indictment

128. Paragraph 6.30 of the Amended Indictment alleges that, between 19 April and late June 1994, Pauline Nyiramasuhuko went with others to the *préfecture* office to abduct refugees and take them to various locations to be executed; and that those who attempted to resist were killed. The Chamber notes, for example, that Prosecution Witness FAP testified about night assaults led by Pauline Nyiramasuhuko at the Butare *Préfecture* office, during which *Interahamwe* abducted refugees and took them to a place where they were killed.[104] Witness FAP also testified that a woman who tried to resist was killed by the assailants.[105] The Chamber is satisfied that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to sustain a conviction beyond reasonable doubt against Pauline Nyiramasuhuko on Paragraph 6.30. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.30.

Request for Acquittal in Relation to Paragraph 6.38 of the Amended Indictment

129. The Chamber recalls that Paragraph 6.38 of the Amended Indictment alleges that, between April and July 1994, Pauline Nyiramasuhuko aided and abetted the population to slaughter the Tutsi in the Butare *Préfecture*. The Chamber relies on the legal definition of "aiding and abetting" under Article 6(1) of the Statute given in the *Kamuhanda* Judgment:[106]

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[99] Exhibit P. 136 A (Guichaoua's Report), Table 13, p. 145 (French version).
[100] T. 29 June 2004, p. 50-51; See French Version, p. 57.
[101] T. 29 April 2004, p. 23-24.
[102] Exhibit P136A (Guichaoua's Report), Vol. II, p. 50 (French Version). T. 28 June 2004, p. 73.
[103] T. 28 June 2004, p. 73.
[104] T. 11 March 2003, p. 57.
[105] T. 11 March 2003, p. 54-55.
[106] *Kamuhanda* Judgment (TC), *op. cit.*, para. 597.

> "Aiding and abetting", pursuant to the jurisprudence of the *ad hoc* Tribunals, relates to acts of assistance that intentionally provide encouragement or support to the commission of a crime.[107] The act of assistance may consist of an act or an omission, and it may occur before, during or after the act of the actual perpetrator.[108] The contribution of an aider and abetter before or during the fact may take the form of practical assistance, encouragement or moral support, which has a substantial effect on the accomplishment of the substantive offence.[109] Such acts of assistance before or during the fact need not have actually caused the consummation of the crime by the actual perpetrator, but must have had a substantial effect on the commission of the crime by the actual perpetrator.[110]

130. In the present case, the Chamber considers that evidence was adduced of Pauline Nyiramasuhuko's attendance at the swearing-in ceremony of *Préfet* Sylvain Nsabimana on 19 April 1994, where, according to the evidence, several authorities made speeches directly and publicly inciting the population of Butare *Préfecture* to massacre the Tutsi. The Chamber is of the view that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt that, by her mere presence, she aided and abetted the population of the Butare *Préfecture* in the commission of the massacres that were subsequently launched against the Tutsi population. The Chamber further notes that Prosecution Expert Witness Guichaoua testified, on the basis of the alleged diary of Pauline Nyiramasuhuko,[111] that Pauline Nyiramasuhuko did not limit herself to issuing orders and organising meetings, but was involved in organising the supply of traditional arms for the *Interahamwe* militia.[112] The Chamber also notes that Prosecution Witness FAS testified that he heard Pauline Nyiramasuhuko tell other authorities that she could provide firearms to kill the Tutsi.[113] There is also evidence that Pauline Nyiramasuhuko let a roadblock be set up in front of her home[114] and that she was present at the Prefectoral Office when crimes were committed.[115] Considering these elements, the Chamber is satisfied that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to sustain a conviction against Pauline Nyiramasuhuko on Paragraph 6.38 beyond reasonable doubt. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.38 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.39 of the Amended Indictment

131. The Chamber notes that Paragraph 6.39 of the Amended Indictment alleges that the entire *Préfecture* of Butare was the scene of massacres of Tutsi involving, among others, Pauline Nyiramasuhuko as a culprit. The Chamber takes note of the evidence of Prosecution Expert Witness Des Forges to the effect that the massacres were committed in the whole

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[107] *Kayishema and Ruzindana* Judgment (AC), *op. cit.*, para. 186; *Semanza* Judgment (TC), para. 385; *Ntakirutimana* Judgment (TC), para. 787; *Bagilishema* Judgment (TC), para. 33 and 36; *Musema* Judgment (TC), para. 125-126; *Kayishema and Ruzindana* Judgment (TC), para. 200-202; *Akayesu* Judgment (TC), para. 484.

[108] *Kunarac et al.* Judgment (TC), para. 391; *Semanza* Judgment (TC), para. 386.

[109] *Kayishema and Ruzindana* Judgment (AC), para. 186; *Kunarac et al.* Judgment (TC), para. 391; *Semanza* Judgment (TC), para. 385.

[110] *Kunarac et al.* Judgment (TC), para. 391; *Semanza* Judgment (TC), para. 386.

[111] Exhibit P 136A ("Guichaoua's Report"), Vol. II, p. 57 (French Version).

[112] T. 30 June 2004, p. 32; See French Version, p. 38.

[113] T. 29 April 2004, p. 23-24.

[114] For example, Prosecution Witness FA (T. 30 June 2004, p. 64 (ICS)), FAP (T. 11 March 2003, p. 41-42), SS (T. 3 March 2003, p. 26), SX (T. 27 January 2004, p. 15), TB (T. 4 February 2004, p. 51-53), TG (31 March 2004, p. 49-50) and TQ (T. 7 September 2004, p. 11-12).

[115] For example, Prosecution Witness QBP (T. 24 October 2002, p. 85), SJ (T. 28 May 2002, p. 122), SS (T. 3 March 2003, p. 29) and TA (T. 24 October 2001, p. 108-109).

Préfecture of Butare.[116] The Chamber also notes that several Prosecution Witnesses testified on Pauline Nyiramasuhuko's direct involvement in the killings that took place, for example, on the roadblock in front of her home,[117] at the Butare *Préfecture* office,[118] and at Mutunda Stadium, Mbazi *Commune*.[119] In light of the evidence referred to in support of previous paragraphs of the Amended Indictment, the Chamber considers that the evidence adduced of Pauline Nyiramasuhuko's involvement in those massacres, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Pauline Nyiramasuhuko's responsibility for the facts pleaded in Paragraph 6.39. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.39 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.42 of the Amended Indictment

132. The Chamber recalls that Paragraph 6.42 of the Amended Indictment refers to an alleged visit of Prime Minister Jean Kambanda accompanied by Pauline Nyiramasuhuko in Ndora *commune* in May 1994, during which those imprisoned for their participation in the killings were released and the consequent removal of the *Bourgmestre* of Ndora. The Chamber notes that this paragraph is not cited in support of any Count of the Amended Indictment and, consequently, cannot be a basis for conviction. Therefore, it is the Chamber's considered opinion that the request for acquittal regarding this paragraph lacks merit and therefore the Chamber denies it pursuant to Rule 98*bis*.

Request for Acquittal in Relation to Paragraph 6.52 of the Amended Indictment

133. As mentioned earlier in its determination on Count 1, the Chamber is satisfied that the evidence adduced in support of this paragraph, if believed, could be sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt of the Accused's guilt. Therefore, acquittal under Rule 98*bis* is denied regarding Paragraph 6.52 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.54 of the Amended Indictment

134. The Chamber recalls that Paragraph 6.54 of the Amended Indictment alleges that Pauline Nyiramasuhuko and others aided and abetted their subordinates and others in carrying out the massacres of the Tutsi and their accomplices. In the light of the elements referred to as regards Pauline Nyiramasuhuko's request for acquittal on Article 6(3) Charges under Counts 1 to 3 and 5 to 11, the Chamber considers that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt, of Pauline Nyiramasuhuko's authority. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.54 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.55 of the Amended Indictment

135. As mentioned earlier in its determination on Count 1, the Chamber notes that several Prosecution Witnesses testified on the killings of people at the roadblock in front of Pauline Nyiramasuhuko's home , notably Prosecution Witnesses FA,[120] FAP,[121] SS,[122] SX,[123] TB,[124]

[116] Exhibit P110A ("Des Forges' Report"), p. 42; T. 8 June 2004, p. 28-29.
[117] For example, Prosecution Witness FA: T. 30 June 2004, p. 53 (ICS).
[118] For example, Prosecution Witness FAP: T. 11 March 2003 p. 54.
[119] For example, Prosecution Witness FAS: T. 28 April 2004, p. 35.
[120] T. 30 June 2003, p. 64 (ICS).

TG,[125] TQ.[126] The Chamber finds that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of the guilt of Pauline Nyiramasuhuko in relation to Paragraph 6.55 of the Amended Indictment. Therefore, acquittal under Rule 98*bis* is denied regarding Paragraph 6.55 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.56 of the Amended Indictment

136. As mentioned earlier in its determination on Count 1, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact of the guilt of Pauline Nyiramasuhuko in relation to Paragraph 6.56 of the Amended Indictment. Therefore, acquittal under Rule 98*bis* is denied regarding Paragraph 6.55 of the Amended Indictment.

II. Deliberation on Ntahobali's Motion

137. The Chamber recalls that Ntahobali's submissions on Paragraphs 6.51 and 6.53 as pleaded in support of Count 1, Paragraphs 6.51 and 6.53 of the Amended Indictment were dismissed under Paragraph 75 of the present Decision, as they fall out of the scope of Rule 98*bis*.

Request for Acquittal on Count 1 (Conspiracy to Commit Genocide)

138. The Defence submits that to convict on the count of Conspiracy to Commit Genocide, evidence must be adduced that the Accused reached an agreement with others for the commission of the crime and that paragraphs of the Amended Indictment on which Count 1 relies, namely Paragraphs 5.1, 6.51, 6.52, 6.55 and 6.56 do not reflect the constitutive elements of the crime. The Defence submits that the Prosecution has failed to adduce evidence of this agreement and rather has tried to infer, on the basis of *prima facie* evidence that the Accused committed crimes, that he was part of a Conspiracy. The Prosecution responds that given the evidence of Ntahobali's involvement in the Genocide, including his leadership of the *Interahamwe*, the Chamber may safely draw the inference that he was part of the conspiracy to commit genocide.

139. The Chamber relies on the same jurisprudence and reasoning as previously held on Pauline Nyiramasuhuko's request for acquittal on Count 1.

140. The Chamber notes that, in support of its Motion, the Defence challenges several paragraphs of the Amended Indictment on which the Count relies. However, the Chamber considers that, before addressing the submissions made by the Defence as regards specific paragraphs, the Chamber should examine the Count of Conspiracy as a whole.[127]

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[121] T. 11 March 2003 p. 41-42.
[122] T. 3 March 2003, p. 26.
[123] T. 27 January 2004, p.15.
[124] T. 4 February 2004, p. 51-53.
[125] T. 31 March 2004, p. 49-50.
[126] T. 7 September 2004, p. 11-12.
[127] *Kamuhanda* Decision on Rule 98*bis*, *op. cit.*, Paragraph 23.

141. The Chamber notes that several Prosecution witnesses described Arsène Shalom Ntahobali as an *Interahamwe* leader.[128] The Chamber notes that Prosecution Witness FA testified that, as such, Arsène Shalom Ntahobali and his mother, Pauline Nyiramasuhuko, organized, before and after the 6 April 1994,[129] several MRND and *Interahamwe* meetings at their home in Butare, where instructions pertaining to the killing of Tutsi were given.[130] The Prosecution evidence also shows that the erection of roadblocks was one of the methods used in the commission of the genocide. And several factual Prosecution witnesses, for example FA[131] and FAP,[132] testified that Arsène Shalom Ntahobali and his mother, Pauline Nyiramasuhuko, led a roadblock in front of their house, where several people were killed. Several Prosecution witnesses, for example Witness FAP[133] testified on the coordinated action of Arsène Shalom Ntahobali and his mother during the night attacks against Tutsi refugees at the *Préfecture* office. The Prosecution also adduced evidence of Arsène Shalom Ntahobali's coordinated action with other named co-conspirators, such as Sylvain Nsabimana[134] and Alphonse Nteziryayo.[135] The Chamber finds that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's participation in a Conspiracy to Commit Genocide.

142. The Defence challenges the responsibility of Arsène Shalom Ntahobali under Paragraphs 5.1, 6.51, 6.52, 6.55 and 6.55 of the Amended Indictment, as they are pleaded in support of Count 1. For the reasons discussed previously, the Chamber dismisses the submissions of the Defence in relation to Paragraph 6.51, which are out of the scope of Rule 98*bis* as they pertain to alleged defects of the Indictment. Therefore, the Chamber limits its determination to Paragraphs 5.1, 6.52, 6.55 and 6.56 of the Amended Indictment.

143. The Chamber notes that Paragraph 5.1 of the Amended Indictment alleges that, from late 1990 to July 1994, several personalities conspired among themselves and with others to work out a plan for the extermination of Tutsi and the elimination of the opposition. Among other things, this plan relied on recourse to hatred and ethnic violence, the training of militiamen and the distribution of weapons to them, as well as the preparation of lists of people to be eliminated. Referring to the same evidence as mentioned in support of its determination on Count 1 taken as a whole, namely that Arsène Shalom Ntahobali was an *Interahamwe* leader, that several MRND and *Interahamwe* were held at his home in Butare before and after 6 April 1994, and his coordinated action with alleged co-conspirators such as Pauline Nyiramasuhuko, his mother, Sylvain Nsabimana and Alphonse Nteziryayo, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under this paragraph.

144. Paragraph 6.52 of the Amended Indictment alleges that the massacres perpetrated between April and July 1994 were the result of a strategy adopted and elaborated by political,

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[128] For example, Prosecution Witness SJ (T. 29 May 2002, p. 23-24); Prosecution Witness SX (T. 27 January 2004, p. 26); Prosecution Witness TB (T. 4 February 2004, p. 48); Prosecution Witness TN (T. 3 April 2002, p. 158), Prosecution Witness TQ (T. 7 September 2004, p. 11-12 (ICS)); Expert Guichaoua (T. 30 June 2004, p. 35); Expert Des Forges (T. 17 June 2004, p. 26).
[129] T. 30 June 2004, p. 65 (ICS).
[130] T. 30 June 2004, p. 51.
[131] T. 30 June 2003, p. 64 (ICS).
[132] T. 11 March 2003 p. 41-42.
[133] T. 11 March 2003, p. 57.
[134] Prosecution Expert Desforges, citing Sylvain Nsabimana: T. 8 June 2004, p. 70.
[135] Prosecution Witness TQ: T. 7 september 2004, p. 16 (ICS).

civil and military authorities at the national and local levels, such as Arsène Shalom Ntahobali, who conspired with others to exterminate the Tutsi. The Defence submits that the Prosecution failed to adduce evidence that Arsène Shalom Ntahobali was considered as an authority, either military or political. The Chamber notes that evidence was adduced that the *Interahamwe* were the youth wing of the MRND Party. Therefore, evidence that Arsène Shalom Ntahobali was an *Interahamwe* leader could reasonably lead to the conclusion that Arsène Shalom Ntahobali had political authority at the local level. Relying on the same evidence in support of its determination on Count 1 taken as a whole, the Chamber further considers that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility for the facts pleaded in this paragraph.

145. Paragraph 6.55 of the Amended Indictment alleges that, knowing that massacres of the civilian population were being committed, political and military authorities including Arsène Shalom Ntahobali took no measures to stop them and, on the contrary, refused to intervene. As mentioned in the previous paragraph, evidence was adduced that Arsène Shalom Ntahobali had political authority at the local level. The Chamber notes that several Prosecution Witnesses, for example those mentioned in support of Count 1, testified that Arsène Shalom Ntahobali led a roadblock in front of his home and that several people were killed at this location. As mentioned previously, evidence of Arsène Shalom Ntahobali's direct involvement in the killings, notably, at the *Préfecture* office, was given by several Prosecution Witnesses. Therefore, the Chamber is of the view that, if believed, the evidence could be sufficient to satisfy a reasonable trier of fact of the responsibility of Arsène Shalom Ntahobali under Paragraph 6.55 of the Amended Indictment to the effect that not only did he fail to stop, but he participated in the killings.

146. Paragraph 6.56 of the Amended Indictment alleges that, in concert with others, Arsène Shalom Ntahobali participated in the planning, preparation or execution of a common scheme to commit the crimes pleaded in the above mentioned paragraphs of the Indictment which were committed by them personally, by persons they assisted or by their subordinates, and with their knowledge and consent. On the basis of the evidence in support of Count 1, namely that Arsène Shalom Ntahobali was an *Interahamwe* leader, that several MRND and *Interahamwe* were held at his home in Butare before and after 6 April 1994, and his coordinated action with alleged co-conspirators such as Nyiramasuhuko (his mother), Sylvain Nsabimana and Alphonse Nteziryayo, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under Paragraph 6.56 of the Amended Indictment.

147. In light of the evidence adduced in support of Count 1 and its supporting paragraphs, the Chamber dismisses Arsène Shalom Ntahobali's Motion for Acquittal under Rule 98*bis* on this Count.

Request for Acquittal on Counts 10 and 11 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II)

148. For the same reasons as mentioned earlier in the determination on Pauline Nyiramasuhuko's request for acquittal on those two Counts, the Chamber considers that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of the non-international nature of the armed conflict that pitted the RPF

against the Rwandese authorities in 1994 and the applicability of Common Article 3 of the Geneva Conventions to the present case.

149. Acquittal of Arsène Shalom Ntahobali on Counts 10 and 11 is denied pursuant to Rule 98*bis*.

Request for Acquittal in Relation to Paragraph 5.1 of the Amended Indictment

150. For the reasons explained in the determination on Arsène Shalom Ntahobali's request for acquittal on Count 1, namely that Arsène Shalom Ntahobali was an *Interahamwe* leader, that several MRND and *Interahamwe* were held at his home in Butare before and after 6 April 1994, and his coordinated action with alleged co-conspirators such as Pauline Nyiramasuhuko, his mother, Sylvain Nsabimana and Alphonse Nteziryayo, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under this paragraph. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 5.1 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.35 of the Amended Indictment

151. The Chamber recalls that Paragraph 6.35 of the Amended Indictment alleges that from April to July 1994, Arsène Shalom Ntahobali travelled throughout the Butare *Préfecture* in search of Tutsi, abducted them and took them to various locations where they were killed. The Defence submits that the evidence adduced by the Prosecution relates to the city of Butare only and that no evidence was adduced that Arsène Shalom Ntahobali travelled throughout the *Préfecture* in search of Tutsi. The Chamber notes that Prosecution Witness TQ testified that Arsène Shalom Ntahobali travelled as far as the Burundian border to stop the evacuation of Tutsi children.[136] The Chamber finds that the evidence led by this witness, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under this paragraph. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.35 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.52 of the Amended Indictment

152. For the reasons explained in the determination on Arsène Shalom Ntahobali's request for acquittal on Count 1, namely the fact that Arsène Shalom Ntahobali was considered as wielding political authority at the local level, that several MRND and *Interahamwe* were held at his home in Butare before and after 6 April 1994, and his coordinated action with alleged co-conspirators such as Pauline Nyiramasuhuko, his mother, Sylvain Nsabimana and Alphonse Nteziryayo, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under this paragraph. Consequently, acquittal under Rule 98*bis* is denied regarding Paragraph 6.52 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.55 of the Amended Indictment

153. For the reasons explained in the determination on Arsène Shalom Ntahobali's request for acquittal on Count 1, namely the fact that Arsène Shalom Ntahobali was considered as

[136] T. 7 September 2004, p. 15-16.

having political authority at the local level, that he led a roadblock in front of his house where several people were killed, his direct involvement in the killings, notably at the *Préfecture* office, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under this paragraph. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.55 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.56 of the Amended Indictment

154. For the reasons explained in the determination on Arsène Shalom Ntahobali's request for acquittal on Count 1, namely that Arsène Shalom Ntahobali was an *Interahamwe* leader, that several MRND and *Interahamwe* were held at his home in Butare before and after 6 April 1994, and his coordinated action with alleged co-conspirators such as Pauline Nyiramasuhuko, his mother, Sylvain Nsabimana and Alphonse Nteziryayo, the Chamber finds that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under Paragraph 6.56 of the Amended Indictment. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.56 of the Amended Indictment.

III. Deliberation on Nsabimana's Motion

155. The Chamber recalls that Nsabimana's submissions on Paragraphs 6.33, 6.51, 6.52, 6.55 and 6.56 of the Amended Indictment as well as requests for acquittal on Count 6 (Extermination as a Crime Against Humanity) and Count 9 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II) were dismissed under Paragraphs 75, 79 and 82 of the present Decision, as they fall out of the scope of Rule 98*bis*.

Request for Acquittal on Count 5 (Crime Against Humanity - Murder)

156. The Defence submits that the Indictment does not charge Sylvain Nsabimana with any Murder and that no evidence was adduced that Sylvain Nsabimana, or his subordinates, committed murder. The Prosecution relies on Prosecution Witnesses TK and RE to submit that the Count was proven beyond reasonable doubt. The Defence replies that those witnesses did not lead direct evidence of the killing of abducted persons. The Chamber notes that this is an issue of reliability that shall be assessed at the end of the Trial.

157. As stated previously, the Chamber finds that submissions based on alleged defects in the indictment fall outside the scope of Rule 98*bis* and shall not be considered. The first Defence argument is therefore dismissed.

158. The Chamber recalls the definition of Murder as a Crime Against Humanity as given in the *Ndindabahizi* Judgment in reference to the ICTR jurisprudence:[137]

> Murder is the intentional killing of a person, or intentional infliction of grievous bodily harm knowing that such harm will likely cause the victim's death or being reckless as to whether death will result, without lawful justification or excuse.[138]

[137] *The Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, Judgement and Sentence (TC), 15 July 2004, para. 487.
[138] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (TC), 2 September 1998, para. 589; *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment (TC), 6 December 1999, para. 81; *Musema*, Judgment (TC), *op. cit.*, para.

> Murder, as with extermination, is punishable as a crime against humanity "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds", as required by Article 3 of the Statute.

159. The Chamber limits its determination as to whether sufficient evidence of Nsabimana's guilt on Count 5 was adduced. The Chamber notes that Sylvain Nsabimana is charged with Murder as a Crime Against Humanity under both Articles 6(1) (i.e. planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of the crime referred to in the Count) and 6(3) (i.e. as a superior for the crimes committed by his subordinates).

160. There is evidence that there were massive and widespread killings during Nsabimana's tenure as *Préfet*. The Chamber notes, for example, that Prosecution Witness TK testified on several abductions and killings at the prefectoral office[139] in the presence of Sylvain Nsabimana.[140] Prosecution Witness RE also testified that, after Sylvain Nsabimana told the refugees that he would find a place where they could settle, they were taken from the Prefectoral Office to Nyange[141] where they were killed.[142]

161. The Chamber is of the view that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Sylvain Nsabimana's accountability for Murder, whether under Article 6(1) and/or 6(3) of the Statute. In accordance with Rule 98*bis*, acquittal is consequently denied on Count 5 (Murder as Crime Against Humanity).

Request for Acquittal on Count 8 (Crime Against Humanity – Other Inhumane Acts)

162. Firstly, the Defence submits that the allegations pleaded in the Indictment under this count are vague. The Prosecution relies on Prosecution Witnesses TK and RE to submit that the Count was proven beyond a reasonable doubt. Secondly, the Defence replies that the Prosecution failed to adduce evidence that the facts testified to by Prosecution Witnesses TK and RE were different and shared the same level of gravity as other Crimes Against Humanity, as required by the *Kayishema/Ruzindana* Judgment (TC).

163. As stated previously, the Chamber recalls that submissions of defects of the indictment fall out of the scope of a Rule 98*bis* Motion and should therefore be dismissed.

164. The Chamber notes with approval the *Kayishema/Ruzindana* Judgment (TC):[143]

> Other inhumane acts include those crimes against humanity that are not otherwise specified in Article 3 of the Statute, but are of comparable seriousness. [...]
>
> Other inhumane acts include acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment,

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215. Other cases have also required that the intentional killing be "premeditated", based upon the use of the word "assassinat" in the French text of the Statute. See e.g. *Semanza*, Judgment (TC), *op. cit.*, para. 334-339.
[139] T. 20 May 2002, p. 36, 38, 62, 72-73.
[140] T. 20 May 2002, p. 43-44, 71 (French Version).
[141] T. 24 February 2003, p. 14.
[142] T. 24 February 2003, p. 15.
[143] *Op. cit.*, Paragraph 150-151.

> acts or omissions that deliberately cause serious mental or physical injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim.

165. The Chamber notes that Sylvain Nsabimana is charged for Inhumane Acts as a Crime Against Humanity under both Articles 6(1) and 6(3).

166. The Chamber further notes for example that Prosecution Witness TK testified that during the refugees' stay at the *Préfecture* office, they received no assistance from the authorities, including Sylvain Nsabimana, and they remained scattered in the courtyard[144] where they were regularly attacked. The witness testified that men and women were separated from each other in the presence of Sylvain Nsabimana[145] and that men were subsequently taken to an old building of the *Préfecture* where they were beaten and insulted.[146]

167. The Chamber finds that the evidence led by this witness, if believed, could be sufficient for a reasonable trier of fact to sustain beyond reasonable doubt a conviction against Sylvain Nsabimana on this count. Therefore, in accordance with Rule 98*bis*, acquittal is denied on Count 8 (Crime Against Humanity – Other Inhumane Acts) of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.25 of the Amended Indictment

168. The Defence submits that the Prosecution failed to adduce evidence that, on Pauline Nyiramasuhuko's request, Sylvain Nsabimana ordered the military authorities to provide her with reinforcements to proceed with the massacres in Ngoma *commune*. The Prosecution admits that no evidence was adduced on this paragraph.

169. The Chamber concludes that no evidence was adduced in support of Paragraph 6.25 of the Amended Indictment and, therefore, acquits Sylvain Nsabimana of the charge as far as it is based on this paragraph.

Request for Acquittal in Relation to Paragraph 6.28 of the Amended Indictment

170. The Defence submits that the Prosecution failed to adduce evidence that Sylvain Nsabimana attended a meeting called by Pauline Nyiramasuhuko in April 1994, as well as the specific date and topics discussed during the meeting. The Prosecution submits that potential defects of Indictment cannot be considered under Rule 98*bis* and that sufficient evidence was adduced that Sylvain Nsabimana held regular meetings on security matters during the period. The Prosecution relies on Prosecution Exhibit P113, which is a document signed by Sylvain Nsabimana, entitled "The Truth About the Massacres in Butare," and on Prosecution Expert Witness Des Forges' testimony to submit that sufficient evidence has been adduced on this point. The Defence replies that this evidence does not reflect the specific facts pleaded in Paragraph 6.28.

[144] T. 20 May 2002, p. 46.
[145] T. 20 May 2002, p. 40-41, 75.
[146] T. 20 May 2002, p. 44.

171. The Chamber recalls that Prosecution Exhibit P113 mentions that Sylvain Nsabimana convened several "pacification" meetings when he was *Préfet*.[147] Expert Des Forges' Report mentions a meeting held on 25 April by Sylvain Nsabimana at the *Préfecture*, where he allegedly told the *bourgmestres* that they should hold security meetings in their communes. Prosecution Expert Witness Guichaoua also testified on the implementation of prefectoral security meetings and civil defence meetings, and on the involvement of Pauline Nyiramasuhuko in those programmes.[148] The Chamber also notes that several Prosecution Witnesses, for example QBQ[149] and SJ,[150] testified about a meeting attended by Sylvain Nsabimana and Pauline Nyiramasuhuko and others in April at the prefectoral office, where Pauline Nyiramasuhuko ordered that the place be cleared of the Tutsi refugees. The Chamber finds that the evidence adduced on this paragraph, if believed, could be sufficient for a reasonable trier of fact to sustain beyond reasonable doubt a conviction against Sylvain Nsabimana. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.28 of the Amended Indictment.

IV. Deliberation on Kanyabashi's Motion

172. The Chamber recalls that Kanyabashi's submissions on Paragraph 6.57 of the Amended Indictment were dismissed under Paragraph 82 of the present Decision, as they fall out of the scope of Rule 98*bis*.

Request for Acquittal in Relation to Paragraph 6.26 of the Amended Indictment

173. The Defence submits that the Prosecution failed to adduce evidence of Joseph Kanyabashi's role in the alleged dismissal of civil servants and political appointees who did not approve or participate with enough zeal in the killings of Tutsi. The Defence admits that Prosecution Witness QA testified about the replacement of the *conseiller* named Said, but stresses that there was no evidence of the role of Joseph Kanyabashi in that event. In its Response, the Prosecution refers to the testimonies of Prosecution Witness QA and Prosecution Expert Witness Guichaoua.

174. The Chamber recalls that Prosecution Witness QA testified that the *conseiller de secteur* Said was arrested early in the month of May by soldiers during a meeting Said called in accordance with Joseph Kanyabashi's instructions.[151] The witness testified that soldiers told him that *conseiller* Said was killed because he was an accomplice of the Tutsi.[152] Witness QA also testified that, before Said's killing, he had heard Joseph Kanyabashi say to the late *conseiller*'s father to tell his son, who was in hiding, that he could come out and that he, Joseph Kanyabashi, would ensure his security.[153] Prosecution Expert Witness Guichaoua's Report[154] and testimony[155] mention the replacements of *bourgmestres* and other civil servants, without a reference to Joseph Kanyabashi's role in them.

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[147] Exhibit P113A ("The Truth About the Massacres in Butare"), p. 7.
[148] T. 29 June 2004, p. 47-48.
[149] T. 3 February 2004, p. 52-53.
[150] T. 28 May 2002, p. 122.
[151] T. 22 March 2004, p. 7.
[152] T. 22 March 2004, p. 53.
[153] T. 18 March 2004, p. 88.
[154] Exhibit P136A (Guichaoua's Report), p. 131-133 (French Version).
[155] T. 29 June 2004, pp. 22-23; See French Version, p. 24-25.

175. On this basis, the Chamber finds that the evidence adduced in support of this paragraph, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Joseph Kanyabashi's role in the dismissals alleged under Paragraphs 6.26 of the Amended Indictment. Therefore, in accordance with Rule 98*bis*, acquittal is denied on this paragraph.

Request for Acquittal in Relation to Paragraph 6.37 of the Amended Indictment

176. The Defence submits that no Prosecution witness was heard as regards the event alleged in this paragraph which relates to the killing of Tutsi refugees on their way back from the Butare University Hospital to their home region. The Prosecution relies on Prosecution Expert Witness Des Forges' Report, which states:[156] "According to testimony, the burgomaster of Ngoma helped to persuade the Huye people to leave and also returned several times in the next two weeks, twice in the company of soldiers, to see that other Tutsi be put out of the hospital. Some of these expelled were reportedly killed at a barrier just a short distance down the road from the hospital." The Chamber is of the view that this evidence, if believed, could be sufficient to demonstrate Joseph Kanyabashi's involvement in the facts pleaded under this paragraph. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.37 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.38 of the Amended Indictment

177. The Defence submits that no Prosecution Witness was heard as regards the checking of identity cards of patients in the Butare University Hospital. The Prosecution responds by relying on the same evidence of Prosecution Expert Witness Des Forges' Report as for Paragraph 6.37 and submits that the Expert was not cross-examined on this point.

178. The Chamber considers that the substance of the evidence of Expert Des Forges' Report does not mention the checking of identity cards; the events it describes allegedly occurred in late April, whereas Paragraph 6.38 specifies the date of 15 May. The Chamber takes note of the facts pleaded in Paragraph 6.38 of the Amended Indictment and is of the view that no evidence has been adduced in support of those facts. Therefore, in accordance with Rule 98*bis*, the Accused shall be acquitted of the charge as far as it is based on this paragraph.

Request for Acquittal in Relation to Paragraph 6.41 of the Amended Indictment

179. The Defence submits that the Prosecution failed to adduce evidence on Joseph Kanyabashi's involvement in the abduction of refugees from the prefectoral office to the woods next to the *École Évangéliste du Rwanda* (EER). The Defence admits that Prosecution Witness Q1 spoke of the abduction of refugees from the EER, but submits that this was a different event. The Defence stresses that the Prosecution decided not to call Prosecution Witness RM who was, according to his will-say Statement, the only witness whose testimony related to this fact. The Prosecution relies on Witness QY's testimony to submit that the other facts pleaded in the paragraph are proven and that there would be no point acquitting the Accused on part of a Paragraph.

[156] Des Forges Report, Exhibit No. 110A, p. 39.

Chamber considers that no direct evidence was adduced of Joseph Kanyabashi's participation in the abduction of people from the prefectoral office to the woods next to the EER. As regards the Prosecution decision not to call Witness RM to testify, the Chamber concurs with the *Semanza* Decision on Rule 98*bis* that:[157]

> Rule 98*bis* is also not a vehicle through which the Defence may move to quash the counts in the indictment because the Prosecutor may not have called all possible witnesses or because the Prosecutor may not be proceeding against all possible perpetrators of alleged crimes. These are matters within the Prosecutor's discretion and, in any event, they are not within the scope of Rule 98*bis*. Consequently, the Chamber does not address those issues in this Decision.

181. The Chamber notes that Joseph Kanyabashi is charged for the facts pleaded in Paragraph 6.41 under both Articles 6(1) and 6(3). The Chamber also notes, for example, that Prosecution Witness QI testified about a policeman who abducted refugees from the EER and took them to the neighbouring woods.[158] According to the evidence, Joseph Kanyabashi had authority either *de jure* or *de facto* on communal policemen. While there may not be evidence of Joseph Kanyabashi's personal involvement in the facts pleaded in this paragraph, it is the view of the Chamber that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Kanyabashi's responsibility for acts committed by others. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 6.41 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.43 of the Amended Indictment

182. The Defence submits that the Prosecution failed to adduce evidence on this paragraph which relates to a meeting at the *Préfecture* where Joseph Kanyabashi allegedly told the *Préfet* that the refugees had to be exterminated. The Prosecution admits that no evidence was adduced that Joseph Kanyabashi told Sylvain Nsabimana that all Tutsi should be eliminated, but relies on Prosecution Witnesses SS and SU to submit that it is proven that Joseph Kanyabashi attended meetings at the *Préfecture* office.

183. The Chamber recalls that Prosecution Witness SS testified that Joseph Kanyabashi attended all meetings at the prefectoral office that were held during the Witness' stay there.[159] Prosecution Witness SU also testified to Joseph Kanyabashi's attendance at meetings at the prefectoral office. However, as admitted by the Prosecution, no evidence was adduced that "[a]t that time, Joseph Kanyabashi told the *Préfet* that the Tutsi refugees at the *Préfecture* had to be exterminated." The Chamber considers that the fact that no evidence was adduced in support of a section of a paragraph cannot lead to an acquittal on the paragraph as a whole when the remaining part of the paragraph is supported by evidence. The Chamber further considers that there would be no point limiting the acquittal to the section of the paragraph which was not proved, since this section alone could not sustain a conviction. Consequently, the Chamber considers that since no evidence was adduced that Joseph Kanyabashi told the *Préfet* that the Tutsi refugees were to be exterminated, Joseph Kanyabashi may not be put to the defence of that aspect of the case. The Chamber, however, denies the acquittal under Rule 98*bis* on the basis of Paragraph 6.43 of the Amended Indictment as a whole.

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[157] *Semanza* Decision on Rule 98*bis*, *op. cit.*, Paragraph 19.
[158] T. 25 March 2004, p. 68 (ICS).
[159] T. 10 March 2003, p. 68-69.

Request for Acquittal in Relation to Paragraph 6.45 of the Amended Indictment

184. The Defence submits that no evidence was adduced of Joseph Kanyabashi's instructions to kill the Tutsi on 21 April in Butare and in June near Butare market. However, the Defence admits that evidence was adduced as regards Save. The Prosecution relies on the testimonies of Prosecution Witnesses QA, QAM and Expert Alison Des Forges to submit that evidence was adduced on the facts pleaded in this paragraph.

185. The Chamber notes that Prosecution Witness QA testified, among other points, on a meeting held on 20 or 21 April, where Joseph Kanyabashi made a speech that was interpreted by the witness as meaning that those who refused to participate in night patrols and roadblocks were to be killed.[160] The Chamber also notes that Prosecution Witness QAM testified that she heard Joseph Kanyabashi say to a *conseiller* that the killings were completed in other areas and ask him what he was going to do.[161] The Chamber finds that the evidence led by those witnesses, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt that Joseph Kanyabashi encouraged people to search for and kill the Tutsi. Acquittal under Rule *98bis* is therefore denied regarding Paragraph 6.45 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.63 of the Amended Indictment

186. In its submissions, the Defence relies on an alleged discrepancy between Paragraph 6.63 and Paragraph 6.32 of the Amended Indictment. As stated before, the Chamber finds that this submission falls outside the scope of Rule 98*bis*. However, the Defence also submits that the Prosecution failed to adduce evidence of Joseph Kanyabashi's authority over people mentioned in Paragraph 6.63. The Prosecution relies on Prosecution Witness SS' testimony to submit that there is evidence of crimes of a sexual nature committed by Joseph Kanyabashi's subordinates.

187. The Chamber notes that Joseph Kanyabashi's responsibility on Paragraph 6.63 is only pleaded under Article 6(3) of the Statute. The Chamber notes, for example, that Prosecution Witness SS testified that sexual crimes were committed against the refugees at the *Préfecture*. The witness said that Joseph Kanyabashi, among others, was at the *Préfecture* during that period of time, and that no authority intervened to stop it.[162] Although Joseph Kanyabashi may not have been present at the time of the assault, the Chamber considers that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Joseph Kanyabashi's responsibility under Article 6(3) of the Statute for the facts pleaded in this paragraph. Acquittal under Rule *98bis* is therefore denied regarding Paragraph 6.63 of the Amended Indictment.

V. Deliberation on Ndayambaje's Motion

188. The Chamber recalls that Ndayambaje's submissions on Paragraphs 6.37 to 6.39 and 6.50 to 6.53 of the Amended Indictment, as well as the deletion of introductory formulation to each Count and the lack of credibility and reliability of Prosecution Witness QAR were dismissed under Paragraphs 75, 79 and 82 of the present Decision, as they fall out of the scope of Rule 98*bis*.

[160] T. 18 March 2004, p. 84.
[161] T. 22 October 2001, p. 49.
[162] T. 3 March 2003, p. 67.

Request for Acquittal on Count 1 (Conspiracy to Commit Genocide)

189. The Defence submits that the Prosecution failed to adduce evidence that Elie Ndayambaje met or even knew his alleged co-conspirators other than Alphonse Nteziryayo. The Defence further submits that the Prosecution failed to adduce evidence that Elie Ndayambaje had an agreement with Alphonse Nteziryayo for the commission of the crimes described in Count 1. The Prosecution relies on its opening statement, on the Decision of joinder and on the testimonies of Prosecution Witnesses TO, QAF, QAR, RV and Expert Guichaoua's Report to submit that sufficient evidence was adduced to satisfy the Chamber of Elie Ndayambaje's guilt on this count.

190. As a preliminary matter, the Chamber underscores that neither the Prosecution opening statement nor this Chamber's Decision on Joinder are relevant for a determination under Rule 98*bis*, for they cannot amount to the proof required for the assessment of any level of guilt.

191. The Chamber relies on the same jurisprudence and reasoning as previously held with respect to Pauline Nyiramasuhuko's and Arsène Shalom Ntahobali's request for acquittal on Count 1. The Chamber will first make its determination on Count 1 as a whole before examining the specific paragraphs contested by the Defence.

192. The Chamber notes that several Prosecution Witnesses testified that Elie Ndayambaje was reappointed *bourgmestre* of Muganza in June and that his swearing-in ceremony was chaired by Alphonse Nteziryayo at the Muganza *communal* office in the Remera *secteur*.[163] Prosecution Witness RV testified that Pauline Nyiramasuhuko, Sylvain Nsabimana and other authorities attended this meeting.[164] Prosecution Expert Witness Guichaoua testified that the swearing-in ceremonies of Alphonse Nteziryayo as *Préfet* and Elie Ndayambaje as *Bourgmestre* corresponded to the launching of the last phase of the killings in Butare *Préfecture* which was aimed at "finishing the work."[165] Both Alphonse Nteziryayo's and Elie Ndayambaje's speeches were reported by Prosecution witnesses as highly inflammatory and Prosecution Witness RV testified that Tutsi who had so far survived were killed after this gathering.[166] The Chamber also notes that several Prosecution Witnesses testified that Elie Ndayambaje coordinated the action of policemen, soldiers, gendarmes and civilians and the procurement and distribution of weapons, in particular during the massacre of Tutsi on Kabuye Hill.[167] There is also evidence that Elie Ndayambaje was involved in the military training of civilians.[168] The Chamber considers that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Elie Ndayambaje's participation in a Conspiracy to Commit Genocide.

193. Count 1 relies on Paragraphs 5.1, 5.8, 5.13, 6.28, 6.30 to 6.34, 6.36 to 6.39 and 6.50 to 6.54 of the Amended Indictment. Among those paragraphs, the Defence does not dispute

[163] Prosecution Witness TO (T. 4 March 2002, p. 11-13), QAF (T. 5 February 2004, p. 65-66), QAR (T. 19 November 2001, p. 55-56) and RV (T. 17 February 2004, p. 5).
[164] T. 17 February 2004, p. 6-7.
[165] T. 29 June 2004, p. 62. See also Exhibit P 136 A (Guichaoua's Report), p. 108-111.
[166] T. 17 February 2004, p. 7-8.
[167] For example, Prosecution Witness FAG (T. 2 March 2004, p. 42-44), FAU (T. 4 March 2004, p. 71-72), QAQ (T. 11 November 2002, p. 31-32 (ICS)), QBZ (T. 23 February 2004, pp. 26 – 28), RT (T. 10 March 2004, p. 68-69), TP (T. 11 February 2004, p. 13-14), TW (10 February 2004, p. 8).
[168] For example, Prosecution Witness TO (T. 4 March 2002, p. 28).

Paragraphs 6.30 to 6.33. For the reasons developed previously, the Chamber dismisses the submissions of the Defence in relation to Paragraphs 6.37, 6.38, 6.39 and 6.50 to 6.53, which are out of the scope of Rule 98*bis* as they relate to alleged defects of the Amended Indictment. Therefore, the Chamber limits its determination on Paragraphs 5.1, 5.8, 5.13, 6.28, 6.34, 6.36 and 6.54 of the Amended Indictment as they are pleaded in support of Count 1.

194. The Chamber recalls that Paragraph 5.1 of the Amended Indictment alleges that, from late 1990 to July 1994, several personalities conspired among themselves and with others to work out a plan for the extermination of Tutsi and the elimination of the opposition. Among other things, this plan relied on recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen, as well as the preparation of lists of people to be eliminated. The Chamber refers to the same evidence as mentioned in support of Count 1, namely the fact that his swearing-in ceremony was attended by several personalities, including Pauline Nyiramasuhuko, Sylvain Nsabimana and Alphonse Nteziryayo, and was the occasion for inflammatory speeches inviting the population to complete the extermination of Tutsi, his coordinated action with policemen, soldiers, gendarmes and civilians and the distribution of weapons, in particular during the massacre of Tutsi on Kabuye Hill, as well as his involvement in the military training of civilians. The Chamber considers that this evidence, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Elie Ndayambaje's responsibility on the facts pleaded in paragraph 5.1 of the Amended Indictment.

195. Paragraph 5.8 of the Amended Indictment alleges that from April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including Elie Ndayambaje. The Chamber relies on the same evidence as referred to in relation to Count 1, especially the fact that his swearing-in ceremony was attended by several personalities, including Pauline Nyiramasuhuko, Sylvain Nsabimana and Alphonse Nteziryayo, and was the occasion for inflammatory speeches inviting the population to complete the extermination of Tutsi, and concludes that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to sustain a conviction against Elie Ndayambaje on Paragraph 5.8 of the Amended Indictment.

196. Paragraph 5.13 of the Amended Indictment alleges that, before and during the events, Elie Ndayambaje and others distributed weapons to the militiamen and certain carefully selected members of the civilian population with intent to exterminate the Tutsi and their accomplices. The Chamber notes that Prosecution Witness RV testified that, on 23 April 1994, Elie Ndayambaje and others raided the weapons and ammunitions store of Muganza jail to take weapons and ammunitions in order to kill Tutsi refugees on Kabuye Hill, Ndora *commune*.[169] The Chamber finds that the evidence led by this witness, if believed, could be sufficient to sustain a conviction against Elie Ndayambaje on Paragraph 5.13.

197. Paragraph 6.28 of the Amended Indictment alleges that, as a result of the Government's appeals to begin the massacres on 19 April 1994, Elie Ndayambaje became the *de facto bourgmestre* of Muganza in order to oversee the massacres in the region. The Defence submits that the Prosecution failed to adduce evidence that Elie Ndayambaje attended the 19 April meeting and that his reappointment as *bourgmestre* was linked to this meeting. The Chamber notes that Prosecution Witness RV testified that Elie Ndayambaje did

[169] T. 16 February 2004, p. 44-45.

not attend the 19 April meeting that was held for the swearing-in of Sylvain Nsabimana.[170] Prosecution Witness RV also testified that Elie Ndayambaje officially resumed as *bourgmestre* on 21 June 1994, more than two months after the 19 April. However, Prosecution Witness RV admitted that, during his interim mandate as *bourgmestre*, Chrysologue Bimenyimana carried out most of the activities under the counsel of Elie Ndayambaje and had to follow Elie Ndayambaje's instructions.[171] Prosecution Witness RV testified that Elie Ndayambaje even took decisions against Chrysologue Bimenyimana's will, by using the *conseillers* who remained on his side.[172] Prosecution Expert Guichaoua's Report notes that, as early as April 1994, Elie Ndayambaje resumed *de facto* his functions as *bourgmestre* of Muganza[173] and, after the governmental authorisation to commit massacres on 19 April 1994, he became very active in their commission.[174] Several Prosecution Witnesses also testified that Elie Ndayambaje had *de facto* authority on the communal policemen during that period.[175] The Chamber finds that the evidence led by those witnesses, if believed, could be sufficient to sustain a conviction against Elie Ndayambaje on Paragraph 6.28.

198. Paragraph 6.34 of the Amended Indictment alleges that Elie Ndayambaje assisted Alphonse Nteziryayo, the official in charge of civil defence, in supervising the training of militiamen and the distribution of weapons to them. The Chamber notes that Prosecution Witness TO testified that in June 1994, Elie Ndayambaje convened a meeting in a forest near Muganza *communal* office in Remera *secteur*, which began by the training of all the attendees of the meeting on how to use of bow and arrows. The Chamber finds that the evidence led by this witness, if believed, could be sufficient to sustain a conviction against Elie Ndayambaje as regards Paragraph 6.34.

199. Paragraph 6.36 of the Amended Indictment alleges that Prime Minister Jean Kambanda met Elie Ndayambaje and others in Muganza *commune* in June 1994 and that, by his presence and by not denouncing the massacres, Jean Kambanda confirmed that the killings were condoned by the Government. The Chamber finds that although the charge pleaded in this paragraph is directed against Jean Kambanda, the paragraph still has relevance to Count 1 (Conspiracy to Commit Genocide) with which Ndayambaje is charged. The substance of that count is considered under Paragraph 192 of the current decision.

200. Paragraph 6.54 of the Amended Indictment alleges that the massacres perpetrated were the result of a strategy adopted by political, civil and military authorities at the national and local levels involving individuals, such as Elie Ndayambaje, who conspired with others to exterminate the Tutsi. The Chamber relies on the same evidence as referred to in support of Count 1 to conclude that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to sustain a conviction against Elie Ndayambaje regarding Paragraph 6.54.

201. In light of the evidence adduced in support of Count 1 and its supporting paragraphs, the Chamber dismisses Elie Ndayambaje's Motion for acquittal under Rule 98*bis* on this Count 1 (Conspiracy to Commit Genocide).

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[170] T. 17 February 2004, p. 61 (ICS).
[171] T. 17 February 2004, p. 47 (ICS).
[172] T. 17 February 2004, p. 51 (ICS).
[173] Exhibit P 136A (Guichaoua's Report), p. 124 (French Version).
[174] *Ibid.* p. 135 (French Version).
[175] Prosecution Witness RV (T. 16 February 2004, p. 46-47 (ICS));

Request for Acquittal in Relation to Paragraph 5.1 of the Amended Indictment

202. For the reasons discussed in the determination on Elie Ndayambaje's submissions relating to Paragraph 5.1 as pleaded in support of Count 1, namely the fact that Elie Ndayambaje's swearing-in ceremony was attended by several personalities, including Pauline Nyiramasuhuko, Sylvain Nsabimana and Alphonse Nteziryayo, and was the occasion for inflammatory speeches inviting the population to complete the extermination of Tutsi, his coordinated action with policemen, soldiers, gendarmes and civilians and the distribution of weapons, in particular during the massacre of Tutsi on Kabuye Hill, as well as his involvement in the military training of civilians, the Chamber considers that the evidence adduced, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Elie Ndayambaje's responsibility on the facts pleaded in this paragraph. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 5.1 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 5.8 of the Amended Indictment

203. For the reasons discussed in the determination on Elie Ndayambaje's submissions relating to Paragraph 5.8 as pleaded in support of Count 1, especially the fact that his swearing-in ceremony was attended by several personalities, including Pauline Nyiramasuhuko, Sylvain Nsabimana and Alphonse Nteziryayo, and was the occasion for inflammatory speeches inviting the population to complete the extermination of Tutsi, the Chamber concludes that the evidence adduced, if believed, could be sufficient for a reasonable trier of fact to sustain a conviction against Elie Ndayambaje in relation to this paragraph. Acquittal under Rule 98*bis* is therefore denied regarding Paragraph 5.8 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 5.13 of the Amended Indictment

204. For the reasons discussed in the determination on Elie Ndayambaje's submissions relating to Paragraph 5.13 as pleaded in support of Count 1, namely that Prosecution Witness RV testified that, on 23 April 1994, Elie Ndayambaje and others raided the weapons and ammunitions store of Muganza jail to take weapons and ammunitions in order to kill Tutsi refugees on Kabuye Hill, Ndora *commune*, the Chamber finds that the evidence adduced in support of this paragraph, if believed, could be sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt of the Accused responsibility. Therefore, pursuant to Rule 98*bis*, the Chamber denies Elie Ndayambaje's request for acquittal regarding Paragraph 5.13 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.28 of the Amended Indictment

205. For the reasons discussed in the determination on Elie Ndayambaje's submissions relating to Paragraph 6.28 as pleaded in support of Count 1, namely the fact that, as early as April 1994, Elie Ndayambaje resumed *de facto* his functions as *bourgmestre* of Muganza and had *de facto* authority on the communal policemen, the Chamber finds that the evidence adduced, if believed, could be sufficient to sustain a conviction against Elie Ndayambaje on Paragraph 6.28. Therefore, pursuant to Rule 98*bis*, the Chamber denies Elie Ndayambaje's request for acquittal regarding Paragraph 6.28 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.34 of the Amended Indictment

206. For the reasons discussed in the determination on Elie Ndayambaje's submissions relating to Paragraph 6.34 as pleaded in support of Count 1, namely the fact that Elie Ndayambaje convened a meeting in a forest near Muganza *communal* office in Remera *secteur*, which began by the training of all the attendees of the meeting on how to use of bow and arrows the Chamber finds that the evidence adduced in support of this paragraph could be sufficient for a reasonable trier of fact to be satisfied beyond reasonable 7doubt of the Accused guilt. Therefore, pursuant to Rule 98*bis*, the Chamber denies Elie Ndayambaje's request for acquittal regarding Paragraph 6.34 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.36 of the Amended Indictment

207. For the reasons discussed in the determination on Elie Ndayambaje's submissions relating to Paragraph 6.36 as pleaded in support of Count 1, the Chamber finds that the evidence adduced in support of this paragraph, if believed, is sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt of the Accused's guilt. Therefore, pursuant to Rule 98*bis*, the Chamber denies Elie Ndayambaje's request for acquittal regarding Paragraph 6.36 of the Amended Indictment.

Request for Acquittal in Relation to Paragraph 6.54 of the Amended Indictment

208. For the reasons discussed in the determination on Elie Ndayambaje's submissions on acquittal on Count 1, the Chamber is of the view that the evidence adduced in support of this paragraph could be sufficient for a reasonable trier of fact to be satisfied beyond reasonable doubt of the Accused's responsibility. Therefore, pursuant to Rule 98*bis*, the Chamber denies Elie Ndayambaje's request of acquittal regarding Paragraph 6.54 of the Amended Indictment.

THEREFORE, THE TRIAL CHAMBER

DENIES Nyiramasuhuko's Motion in its entirety;

DENIES Ntahobali's Motion in its entirety;

GRANTS PARTIALLY Nsabimana's Motion in the following terms: (a) **ACQUITS** Sylvain Nsabimana on the charges as founded on Paragraph 6.25 of the Amended Indictment, as discussed in Paragraphs 168-169 of the present Decision;

DENIES Sylvain Nsabimana's Motion in all other respects;

GRANTS PARTIALLY Kanyabashi's Motion in the following terms: (a) **ACQUITS** Joseph Kanyabashi on the charges as founded on Paragraph 6.38 of the Amended Indictment, as discussed in Paragraphs 177-178 of the present Decision;

DENIES Joseph Kanyabashi's Motion in all other respects, except as specified in Paragraphs 182-183 of the present Decision with regard to the following section of Paragraph 6.43 of the Amended Indictment: "[a]t that time, Joseph Kanyabashi told the *Préfet* that the Tutsi refugees at the *Préfecture* had to be exterminated";

DENIES Elie Ndayambaje's Motion in its entirety.

Arusha, 16 December 2004

William H. Sekule
Presiding Judge

Arlette Ramaroson
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]