International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
02-02-2005
(23598-23581)

23598
S. Mussa

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 2 February 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON MOTIONS FOR JUDGEMENT OF ACQUITTAL

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
René Saint-Léger
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF motions for judgement of acquittal, filed by the Bagosora Defence on 18 October 2004, and by the Defence teams of the other Accused on 21 October 2004;

CONSIDERING the Prosecution Response, filed on 26 October 2004; the Ntabakuze Replies, filed on 8 and 25 November 2004; the Nsengiyumva Reply, and Corrigenda, filed on 22 and 28 December 2004, respectively; and the Bagosora Reply, filed on 7 January 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. After calling eighty-two witnesses and entering 326 exhibits, the Prosecution closed its case on 14 October 2004, subject to the filing of a motion to introduce statements of deceased witnesses. The Prosecution filed its motion the next day. All Defence teams filed motions for judgement of acquittal within seven days of the conditional closure of the Prosecution case on 14 October 2004. On 19 January 2005, the Chamber granted the Prosecution motion in part, admitting three witness statements and part of a fourth. The Chamber also granted the Defence seven days to make additional submissions in support of the 98 *bis* motions in relation to the newly admitted evidence.

SUBMISSIONS

2. The parties have made three types of submissions: on the nature of the Chamber's inquiry under Rule 98 *bis*; on the sufficiency of the evidence in relation to the crimes alleged in the counts of the Indictments; and on the sufficiency of the evidence in relation to individual paragraphs of the Indictments. The parties' submissions totalled more than six hundred pages, and are too voluminous to be meaningfully summarized here. In any event, for the reasons elaborated below, exhaustive recitation is unnecessary. In the present section, only selected general arguments concerning the scope of the inquiry under Rule 98 *bis* will be reviewed. Specific submissions concerning the sufficiency of evidence, where relevant, will be considered in the "Deliberations" section below. The Chamber emphasizes, however, that it has reviewed all of the arguments and submissions of the parties, and that it has exercised its judgement in limiting references thereto.

3. The parties are agreed as to the standard which must be met by Prosecution evidence to resist a motion for judgement of acquittal: there must be evidence upon which a reasonable trier of fact could find the accused guilty of the crime charged.[1] For that to be the case, there must be evidence upon which a reasonable trier of fact could find that each element of the offence had been proven beyond a reasonable doubt. The Defence argues, further, that the sufficiency of evidence should be evaluated not only in relation to entire counts of an indictment, but also in respect of individual paragraphs. In other words, individual paragraphs of an indictment should be struck out where they are not supported by sufficient evidence for

[1] Nsengiyumva Motion, paras. 17-25; Bagosora Motion, paras. 8-12; Kabiligi Motion, paras. 4-7; Ntabakuze Motion, paras. 4-10; Prosecution Reply, para. 156. The parties also agree that the burden of proof to show an absence of sufficient evidence rests with the Defence, as the moving party: Ntabakuze Motion, paras. 25-26; Bagosora Motion, para. 6 (endorsing all legal arguments of the Ntabakuze Defence); Prosecution Response, para. 159.

any reasonable trier of fact to believe.[2] Although the Prosecution does not expressly agree with this argument, it has submitted charts detailing the evidence in support of each paragraph of the Indictments challenged by the Defence.

4. The Defence argues that a judgement of acquittal should be entered where charges in an Indictment are impermissibly vague or otherwise defective regardless of the nature of the evidence adduced. Where no reasonable Chamber, at the end of the trial, could enter a finding of guilt because of such a legal defect, a judgement of acquittal is appropriate.[3] No submissions were made by the Prosecution in opposition to this argument.

5. The Defence concedes that, in principle, the Chamber should defer evaluation of the weight of the evidence until the end of the trial, and must treat the Prosecution evidence as provisionally credible.[4] This principle should give way, however, where the evidence is uncorroborated or unsubstantiated hearsay;[5] "obviously unreliable and not credible";[6] expert evidence whose factual foundation has not been the object of factual proofs;[7] or where the Prosecution case has "completely broken down".[8] The Prosecution opposes any such evaluation of evidence, arguing that it is impractical for the parties, given the time limits imposed by Rule 98 *bis*, to prepare adequate submissions showing the inter-relationship of all the evidence. Further, such a procedure would unduly duplicate judicial effort, requiring the Chamber to weigh the totality of the Prosecution evidence at the end of the Prosecution case and again at the end of the trial.[9] The Nsengiyumva Defence argues that other categories of evidence should be disregarded by the Chamber, including uncorroborated testimony of a single witness to an event, and evidence which is vague or inconsistent with other testimony.[10]

DELIBERATIONS

(i) General Principles

6. Rule 98 *bis*, "Motion for Judgement of Acquittal", provides that:

> 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 ... shall order the entry of judgement of acquittal in respect of those counts.

In interpreting a substantially identical provision of the ICTY Rules, the Appeals Chamber succinctly defined the phrase "insufficient to sustain a conviction":

> The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond a 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 a 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 a reasonable doubt and yet, even if no defence

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[2] Nsengiyumva Motion, paras. 14, 29-43; Bagosora Motion, para. 13; Kabiligi Motion, para. 9.
[3] Ntabakuze Motion, paras. 12-15, 38-64; Kabiligi Motion, paras. 13-29.
[4] Ntabakuze Motion, para. 7; Kabiligi Motion, para. 11; Bagosora Motion, para. 10; Nsengiyumva Motion, para. 46.
[5] Ntabakuze Motion, paras. 20-24.
[6] Kabiligi Motion, para. 11.
[7] Bagosora Motion, paras. 15-20.
[8] Kabiligi Motion, para. 11; Nsengiyumva Motion, paras. 47-63.
[9] Prosecution Response, paras. 161-62.
[10] Nsengiyumva Motion, paras. 64-66, 72-74.

> 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 a reasonable doubt.[11]

In assessing whether there is sufficient evidence upon which a reasonable trier of fact could, at the end of the trial, enter a conviction, the Chamber must "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief".[12] Accordingly, the object of the inquiry under Rule 98 *bis* is not to make determinations of fact having weighed the credibility and reliability of the evidence; rather, it is simply to determine whether the evidence – assuming that it is true – could not possibly sustain a finding of guilt beyond a reasonable doubt. That will only be the case where there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief.[13] To be incapable of belief, the evidence must be obviously incredible or unreliable; the Chamber should not be drawn into fine assessments of credibility or reliability.[14] Needless to say, a finding that evidence is not obviously incredible does not foreclose the Chamber, at the end of the trial, from finding that the evidence is, in fact, neither credible nor reliable.

7. The inquiry under Rule 98 *bis* is limited to determining whether "the evidence is insufficient to sustain a conviction". The Chamber is not mandated to consider whether the Defence has had insufficient notice of charges to sustain a conviction, or whether there are other legal defects in an Indictment which could lead to acquittal.[15] Furthermore, recent jurisprudence confirms that the sufficiency of notice involves a careful assessment of, *inter alia*, the timing and content of disclosure.[16] Understandably, in light of the time-limits imposed by Rule 98 *bis*, the parties have not made submissions on such matters. Accordingly,

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[11] *Jelisic*, Judgement (AC), 5 July 2001, para. 37.

[12] *Id.* para. 55; *Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC), para. 18.

[13] As to the necessity that there be evidence in support of each element of the crime: *Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC), para. 18 ("if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction"); *Sikirica et al.*, Judgement on Defence Motions to Acquit (TC), 3 September 2001, para. 9 ("if ... an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction, and the motion filed under Rule 98 *bis* would succeed"); *Milosevic*, Decision on Motion for Judgement of Acquittal (TC), 16 June 2004, para. 13 (sufficiency of evidence to be assessed in relation to "elements of a charge").

[14] *Strugar*, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis* (TC), 21 June 2004, para. 17 (where the Chamber stated that the evidence must be "inherently incredible" to be rejected at the 98 *bis* stage, and that such situations would arise only "rarely"); *Kordic and Cerkez*, Decision on Defence Motions for Judgement of Acquittal (TC), 6 April 2000, para. 28 (credibility and reliability of evidence only to be considered 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"); *Semanza*, Decision on the Defence Motion (TC), 27 September 2001, para. 16 (rejecting Defence arguments concerning credibility and reliability of evidence as beyond the scope of the 98 *bis* inquiry); *Kvocka et al.*, Decision on Defence Motions for Acquittal (TC), 15 December 2000, paras. 15-20 (the Chamber will only reject evidence which is "so unreliable that no reasonable trier of fact could credit it").

[15] *Nyiramasuhuko et al.*, Decision on Defence Motions for Acquittal Under Rule 98 *bis* (TC), 16 December 2004, paras. 73-75; *Semanza*, Decision on the Defence Motion (TC), 27 September 2001, para. 18; *Kunarac et al.*, Decision on Motion for Acquittal (TC), 3 July 2000, para. 27 (rejecting a request to consider cumulative charging as beyond the scope of the 98 *bis* inquiry).

[16] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197 ("Whether the Prosecution cured a defect in the indictment depends, of course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensated for the indictment's failure to give notice of the charges asserted against the accused"); *Ntakirutimana*, Judgement (AC), 13 December 2004 para. 27 ("the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant").

the Chamber is neither legally authorized by Rule 98 *bis* nor factually able to consider such matters.[17]

8. The Defence argues that the Chamber should inquire into the sufficiency of evidence in relation to each paragraph of the Indictments. The Chamber considers such an approach to be neither necessary under the Rules, nor appropriate in relation to the Indictments presently under consideration. Rule 98 *bis* requires the Chamber to determine only whether "the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment", and to order a "judgement of acquittal in respect of those counts". Most previous 98 *bis* decisions in this Tribunal have examined the evidence in relation to counts, without also testing the sufficiency of evidence in relation to each paragraph of an indictment.[18] The approach at the ICTY is not markedly different. The Defence has misinterpreted certain ICTY Trial Chamber decisions which have dismissed counts in part, where there is insufficient evidence in respect of some alleged incidents of the crime, but not others. For example, in *Kordic & Cerkez*, the Chamber dismissed charges of a war crime in respect of some geographic locations, but not others.[19] This does not mean that the Chamber considered itself bound under 98 *bis* to consider every allegation in the indictment in relation to the war crime, but simply that it was required to consider each distinct incident challenged by the Defence which could sustain the count.[20]

9. Examining the evidence in relation to counts charged is particularly appropriate in the present case. Many paragraphs of the Indictments are inter-dependent, narrating disparate material facts which, when viewed as a whole, purport to show that the Accused encouraged, and gave support to, militia and soldiers who committed criminal acts. The Chamber would easily be drawn into an unwarranted substantive evaluation of the quality of much of the Prosecution evidence if it were to pronounce on the sufficiency of evidence in relation to each material fact in each paragraph in the Indictments. Rule 98 *bis* requires no such exercise. The inquiry under Rule 98 *bis* is simply whether there is sufficient evidence to say that a reasonable trier of fact could find a count proven beyond a reasonable doubt, if the evidence were to be believed.

10. The Defence has urged that certain rules be applied in assessing the sufficiency of evidence. It suggests that expert evidence cannot be used to prove factual matters without factual evidence as a foundation; that "indirect" evidence, such as hearsay, should not count as evidence; that uncorroborated testimony should be disregarded; and that weak, vague, or contradicted evidence should be discounted or ignored. The guiding principle, as stated above, is that Prosecution evidence is entitled to credence unless the Chamber determines that no reasonable trier of fact could rely upon it. In determining whether evidence is sufficient, however, the Chamber must evaluate whether the evidence invoked by the Prosecution is

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[17] The Defence for Ntabakuze argues that only the paragraphs specifically cited in the counts of the Indictment can be used to substantiate the charges in the count. The Chamber expresses no view on this legal argument at this stage. Under Rule 98 *bis*, however, the Chamber is directed to consider the totality of the evidence regardless of an alleged defect in the Indictment which might disqualify some evidence from consideration.

[18] *Nahimana et al.*, Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC); *Ntagerura et al.*, T. 6 March 2002 (oral argument and decision); *Kamuhanda*, Decision on Kamuhanda's Motion for Partial Acquittal, etc., 20 August 2002. Cf. *Nyiramasuhuko et al.*, Decision on Defence Motions for Acquittal Under Rule 98 *bis* (TC), 16 December 2004.

[19] *Kordic and Cerkez*, Decision on Defence Motions for Judgement of Acquittal (TC), 6 April 2000, para. 35.

[20] See *Kvocka et al.*, Decision on Defence Motions for Acquittal (TC), 15 December 2000, para. 9 (the Chamber "may enter a judgement of acquittal not only with regard to an entire count of the indictment, but also with regard to a factual incident or event cited in the indictment in support of the offence, if the Prosecutor's evidence on that particular incident does not rise to the level of the standard laid down in Rule 98 *bis* (B)" (emphasis added); *Kunarac et al.*, Decision on Motion for Acquittal (TC), 3 July 2000 (entering acquittals in respect some, but not all, incidents of rape, charged in the indictment). Cf. *Milosevic*, Decision on Motion for Judgement of Acquittal (TC), 16 June 2004.

actually probative of the elements of the offence charged. The significance of the evidence should not be viewed narrowly, and is entitled to any inferences or presumptions which a reasonable trier of fact could make.[21] As it is well-established that a reasonable trier of fact may reach findings based on uncorroborated or hearsay evidence; that contradictory evidence may nevertheless be reliable, at least in part; and that circumstantial evidence may be sufficient to prove guilt beyond a reasonable doubt, there is no justification for discounting these types of evidence on a motion to acquit.[22] As for expert evidence, it may include not only opinion evidence, but also factual evidence as introduced through documents or, possibly, hearsay. Accordingly, the categorical limitation on the use of expert evidence suggested by the Defence is also unjustified.

11. The sufficiency of evidence in relation to each count of the Indictments is examined in the following section. The evidence related to each required element of the offence will be evaluated in light of the totality of the evidence, along with any reasonably possible inferences. The evidence shall be assumed to be reliable and credible unless convincing arguments have been raised that it is obviously unbelievable, such that no reasonable trier of fact could rely upon it. The Chamber's sole concern is to determine whether the sufficiency threshold under Rule 98 *bis* is satisfied.

(ii) Sufficiency of Evidence in Relation to Counts

(1) Conspiracy to Commit Genocide – Count 1 of the Indictments

12. Conspiracy is constituted when two or more persons agree to a common objective, the objective being a criminal act.[23] The *actus reus* of conspiracy to commit genocide, prescribed as an offence under Article 2 (3)(b) of the Statute, is, accordingly, the act of entering into an agreement whose common object is to commit genocide; the *mens rea* is the intent to enter into such an agreement. Neither the *actus reus* nor the *mens rea* exists unless the perpetrator has, in common with his or her co-conspirators, the requisite specific intent of the crime of genocide.[24] That intent may be proven by what the perpetrator said or, as with any crime, by drawing inferences from conduct which may show intent.[25] The offence is complete upon the agreement itself: the criminal object of the agreement need not be achieved. The existence of the agreement may be demonstrated by circumstantial evidence as, for example, co-ordinated action in pursuit of the unlawful act.[26]

13. Genocide is defined in Article 2 (2) of the Statute as:

> ...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
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> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;

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[21] *Kvocka et al.*, Decision on Defence Motions for Acquittal (TC), 15 December 2000, para. 13 ("The Chamber finds that the applicable standard is whether a reasonable trier of fact could, upon the evidence presented by the Prosecutor, taken together with all reasonable inferences and applicable legal presumptions and theories that might be applied to it, convict the accused").
[22] *Kupreskic*, Judgement (AC), 23 October 2001, para. 31; *Ndindabahizi*, Judgement (TC), para. 24; *Rutaganda*, Judgement (AC), 26 May 2003, paras. 34-35.
[23] *Musema*, Judgement (TC), para. 190.
[24] *Id.* para. 192 ("With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such"); *Niyitegeka*, Judgement (TC), 16 May 2003, para. 423.
[25] *Ndindabahizi*, Judgement (TC), para. 454 (with further references).
[26] *Nahimana et al.*, Judgement (TC), paras. 1046-1049.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring members of the group to another group.

14. The time frame of the alleged conspiracy is "from late 1990 until July 1994".[27] In accordance with the principles enunciated above, the Chamber's task is to determine whether there is evidence upon which a reasonable trier of fact could find that a conspiracy was formed amongst the Accused during the period identified in the Indictment.

15. The evidence is generally not based on direct observation of the Accused entering into an agreement with one another. Rather the evidence concerns the words and conduct of the Accused, sometimes in the presence of one another, which is said to be indicative of the existence of the alleged agreement. The words and conduct must be viewed, according to the Prosecution, in the context of evidence that a conspiracy to commit genocide had been conceived, and that preparations for its execution undertaken, by elements of the military and militia groups during the period in question. Furthermore, the Prosecution has asserted that the manner in which events unfolded after 6 April 1994, including the behaviour of the Accused, is indicative of the existence of a conspiracy and of concerted planning prior to that date.[28] An overview of selected elements of that evidence clarifies the nature of the inferences suggested by the Prosecution:

- clandestine groups of senior military officers, of which some or all of the Accused were members, were hostile to the civilian Tutsi population prior to April 1994;[29]

- Bagosora, Ntabakuze and Nsengiyumva were members of a commission which produced a report distributed to the military in late 1992 which arguably equated the civilian Tutsi population of Rwanda with the enemy;[30]

- Bagosora, Ntabakuze, Kabiligi and Nsengiyumva made remarks prior to April 1994, sometimes in the presence of other alleged co-conspirators, which arguably could be interpreted as threats or exhortations to kill civilian Tutsi;[31]

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[27] Paragraph 5.1 of the Indictments.
[28] Prosecution Response, paras. 30, 34, and evidence cited in appendices.
[29] ZF testified that all four Accused were members of the "zero network", which was connected to the "death squads" and to an organization called *abakozi* (27 November 2002, pp. 67-68);
[30] P13.1 purports to be a copy of at least a portion of the alleged report; Witnesses CE and DBQ claim that they saw the report in 1992 (T. 14 April 2004, pp. 9, 11; T. 22 September 2003, p. 9); interpreting the language of the document, Expert Witness DesForges testified that the report identified "Tutsi as the enemy and, in a general sense, equating them, that is Tutsi civilians, with members of the military force which had attacked the country, the RPF" (10 September 2002 p. 77); CE, DBQ and XXQ also testified that they interpreted the report as identifying Tutsi civilians as the enemy (T. 14 April 2004, pp. 9, 11; T. 22 September 2003, p. 9; 11 October 2004, pp. 38-39).
[31] Bagosora: leaving the Arusha negotiations in late 1993 to "prepare the apocalypse" (Sagahutu, T. 28 April 2004, p. 32; XAM, T. 29 September 2004, p. 3); in the presence of Ntabakuze and Nsengiyumva, declared to an assembly at Butotori Camp that the "Tutsi had to be exterminated" because they had, in turn hatched a plot to exterminate the Hutu (ZF, 27 November 2002, pp. 71-72); similar testimony by DCH (23 June 2004, p. 39), and by XBM, referring to an assembly on 24 May 1994 at the Meridien Hotel in Gisenyi, at which Nsengiyumva was also present (14 July 1994, pp. 24-26); Bagosora's voice heard on an audio-tape of a celebration for the Bishop of Ruhengeri in November 1993 that the Tutsi must be exterminated (XXY, 11 June 2004, pp. 9-10). Ntabakuze: told his soldiers that if hostilities resumed, "they were going to start with the Tutsi living close to the [Kanombe] camp instead of going to fight the *Inkotanyi* who were too far in the forest, they would start with the enemy, the Tutsi who were living close to the camp" (DBQ, 23 September 2003, pp. 47-48). Kabiligi: at a meeting on 15 February 1994, identified the enemy as "Tutsis and the pro-RPF Hutus who were therefore

- Bagosora, Ntabakuze, Nsengiyumva, and Kabiligi made remarks after 6 April 1994, sometimes in one another's presence, which arguably could be interpreted as threats or exhortations to kill Tutsi civilians;[32]

- there were communications amongst the Accused arguably suggesting co-ordinated conduct and that they were, on some occasions, together;[33]

- lists of Tutsi were prepared by the Accused prior to 7 April 1994, and were used thereafter to identify and kill Tutsi and moderate leaders; either by inference or direct evidence, the purpose of the lists was to carry out a genocide of the Tutsi population;[34]

- the military, including the Accused, were involved in the training and distribution of weapons to the *Interahamwe* and other militia groups prior to 6 April 1994;[35]

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opposed to the Habyarimana government", and that Tutsi should start to be killed through commando operations (XXQ, 11 October 2004, pp. 7, 38-39). Nsengiyumva: said, in Bagosora's presence, that strategies had been developed to solve the "problem of accomplices", which could be interpreted as a veiled reference to Tutsi civilians (XBM, 14 July 2003, p. 23).

[32] Witness ABQ testified that some time between April and July 1994, he heard Bagosora, in the presence of Nsengiyumva, tell a story to an assembly in Gisenyi whose import was that even Tutsi children should be killed (6 September 2004, pp. 26-27); DAS testified that Bagosora, in the presence of Nsengiyumva, said that "the time of the Tutsi men and women is all over", that people were killed at a roadblock in the presence of Bagosora and Nsengiyumva, and that Bagosora expressly ordered the killing of Tutsi (5 November 2003, pp. 41, 50-51); DCH testified that Bagosora encouraged a group, possibly Interahamwe, to kill a group of Tutsi after they had been taken away from the Hotel Mille Collines (22 June 2004, p. 72) . Kabiligi: passes through a roadblock, manned by soldiers and others, where there are many dead civilian bodies, but says nothing to the soldiers (DY, 16 February 2004, pp. 37-38); reportedly reprimands a soldier for not cooperating with the *Interahamwe* to kill Tutsi in Mururu and Nyarushishi (XXY, 11 June 2004, p. 5) . Ntabakuze: encourages or orders soldiers and *Interahamwe* to take away and kill Tutsi hiding in St. André college (DBQ, 25 February 2004, pp. 9-11); urges the killing of Tutsi in a hospital in Kabgayi, (XAI, 8 September 2003, pp. 54-59) Nsengiyumva: orders strengthening of roadblocks in Gisenyi after 7 April 1994 and urges others to kill Tutsi (DO, 30 June 2003, pp. 15-23; ABQ, 6 September 2004, pp. 4-8; OQ, 16 July 2003, p. 10).

[33] ZF offered hearsay evidence that Nsengiyumva was on the telephone with Bagosora on the night of 6 April 1994 and that Nsengiyumva used the word "apocalypse" during the conversation (28 November 2002, pp. 64-65).

[34] Bagosora: "[The] captain asked the soldiers, 'But why do you want to kill this lady?' [Soldiers replied] Bagosora has given us a list, and he has said that we should finish that list by 1 p.m. Do you think we are going to do everything, finish off all those who are on that list? Do you think we'll have scoured the whole Kiyovu neighbourhood?" (ATY, 27 September 2004, pp. 22-25). Nsengiyumva: "He had a sheet of paper in his hand. On that paper there was a list of the major *Inyenzi* who had to be eliminated at all cost. He read the names of those who were on that list" (ABQ, 6 September 2004, pp 6-7); XBH testified that in February 1994, Bagosora, Nsengiyumva and a third military officer prepared lists of names of Tutsi to be eliminated in Gisenyi and that these lists were distributed to military and government leaders in Gisenyi (3 July 2003, p. 17; 4 July 2003, pp. 40-41). Generally: Beardsley testified that UNAMIR soldiers in Kinihira neighbourhood of Kigali saw Presidential Guard soldiers, gendarmerie, and militia moving from house to house using lists, and could hear gunfire and screaming (3 February 2004, p. 40).

[35] "Ntabakuze sometimes came to attend these [*Interahamwe*] meetings [in 1993 in Kabuga], and I remember one occasion when he came in the company of Lieutenant Colonel Nzabanita, Innocent, also known as *Dictionnaire*. And they said that weapons were available and that there were also instructors available, that there were reserve soldiers living in our locality who were going to train people, and that he -- they would even place at our disposal soldiers for the training. And that is exactly what happened...." (DCH, 23 June 2004, pp. 5-7); there was evidence that Bagosora and Nsengiyumva were in favour of *Interahamwe* training, and that widespread training of *Interahamwe* took place on military bases. There was also evidence that weapons were distributed to the *Interahamwe* from military stores on the orders of Bagosora, Nsengiyumva and Ntabakuze: e.g. (KJ, 27 April 2004, p. 65-67; ZF, 28 November 2002, p. 8; A, 1 June 2004, pp. 39-40; DBY, 22 September 2004, p. 7). It is not clear whether there is evidence of Kabiligi's direct involvement in this training or distribution of weapons.

- prior to 6 April 1994, the *Interahamwe* were preparing to kill large numbers of Tutsi and, *inter alia*, had prepared lists to identify targets;[36]

- the genocidal goals of the *Interahamwe* were subsequently confirmed by their involvement in widespread killings after 6 April 1994, during which period the Accused continued to supply weapons and support them, lending support to the inference that they had supported those goals all along.[37]

This synopsis should not be understood as an indication that the Chamber accepts the evidence summarized to be truthful and reliable. The evidence enumerated above is not, however, obviously incredible such that no reasonable trier of fact could give it credit.

16. The Prosecution asserts that the inter-relationship of the Accused as senior officers within the military sets the stage for what appears to be a series of co-ordinated or even common actions: the promulgation of the definition of the enemy, which may arguably have targeted Tutsi civilians; the dissemination of that definition amongst soldiers in the army by the Accused; the uncanny repetition of that definition by the four Accused on various occasions; support for the *Interahamwe* using the resources of the military; and, finally, the direct evidence of some of the Accused being together on various occasions during one or more acts – speeches, preparing lists, ordering killings – which arguably encouraged the

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[36] The *Interahamwe* was said to be an organization through which Hutu could close ranks against the Tutsi, and that the Tutsi were the enemy (DCH, 23 June 2004, pp. 3-4). Songs were sung during training whose import was that the Tutsi should be exterminated (Sagahutu, 29 April 2004, pp. 7-10; LAI, 31 May 2004, p. 30) and lists of Tutsi to be targeted were prepared by the *Interahamwe* (DCH, 23 June 2004, pp. 5-6; BY, 2 July 2004, pp. 39-41). Claeys reported hearsay information that an *Interahamwe* informant, "Jean Pierre", had been ordered to register the entire Tutsi population of Kigali for the purpose of exterminating them, and that a plan had been prepared for the killing of a thousand people every twenty minutes. (7 April 2004, pp. 33-35).

[37] Bagosora: "When I saw [Bagosora], he was accompanied by Nzabanita and other *Interahamwe* leaders in the neighbourhood. I think he was giving them instructions to start operations ... He had sheets of paper in his hands ... I thought he [Bagosora] was giving instructions because he was asking them to begin working from house to house and seek out Tutsi, and at that time, the Tutsi were referred to as *Inyenzi*." (CW, 8 October 2004, pp. 8-11); "Col. Theoneste Bagosora invited us [*Interahamwe* leaders] to a meeting before the arrival of Mr. General Romeo Dallaire ... there were three other chef de secteur, *Interahamwe* secteur leaders at the level of Kigali ... He began by thanking the *Interahamwe chef de secteurs* who were present regarding the way they had conducted themselves during that period. He congratulated them, and he asked them to be vigilant because at that time the killings had almost come to an end, and it was necessary to see in what way they were going to collaborate or to cooperate with the soldiers. There was one *chef de secteur*, that is the one from Gikondo, who had problems, because the RPF had set up a corridor to resupply the soldiers at the *Hôtel Rebero l'Horizon*; they had set up a corridor between the CND and the Rebero Horizon Hotel. So the *chef de secteur* of Gikondo asked Mr. Bagosora to see how to reinforce the *Interahamwe* with soldiers, and Mr. Bagosora responded that he was going to see to it, together with the soldiers and the gendarmerie ... at the time Col. Theoneste Bagosora was a very powerful man; he was the most powerful man in Rwanda ..." (A, 1 June 2004, pp 71-72, 74); in June 1994, in Bulinga, Bagosora is alleged to have told the witness "You can see that Tutsi are causing you to flee. Wherever you go, kill the Tutsi, right up to the babies" (XXY, 11 June 2004, p. 17); (XBM, 14 July 2003, pp. 24-26). Ntabakuze: urges the killing of Tutsi in a hospital in Kabgayi, and says that he will send in *Interahamwe* to do so (XAI, 8 September 2003, pp. 54-59); distributes weapons to *Interahamwe* in Camp Kanombe (DCH, 22 June 2004, p. 86). Kabiligi: during a visit to a hospital in Gisenyi in June or July 1994, is joined by Nsengiyumva: "I don't know what they talked about, then Kabiligi said that in the Kibuye area there were still Tutsi who were being supplied, being fed, and all things had to be done to ensure that such supplies are cut off, and then he went off ... He said that at Karongi and Bisesero there still were Tutsi ... He wanted to use or pass through the Turquoise area, take advantage of that situation so as to ensure that no Tutsi survived in that area ... He said he was going to go down to ensure that Tutsis no longer obtained those supplies. He said that he did not want any Tutsi still alive at the time the Turquoise operation soldiers would get to that area." (XAI, 9 September 2003, pp. 13-16); hearsay evidence of reprimanding a soldier for not cooperating with the *Interahamwe* to kill Tutsi in Mururu and Nyarushishi (XXY, 11 June 2004, pp. 2-6); hearsay evidence that Kabiligi sent soldiers to assist the *Interahamwe* in killing Tutsi civilians (XXY, 11 June 2004, p. 6). Nsengiyumva: distributed weapons and gave instructions to *Interahamwe* leaders on 7 April and subsequent days, including reading lists of Tutsi to be killed (DO, 30 June 2003, pp. 15-23; ABQ, 6 September 2004, pp. 4-8; OQ, 16 July 2003, p. 10).

commission of genocide. If believed, the evidence could lead to a finding that the Accused, and others, entered into a conspiracy to commit genocide at some point during the period alleged in the Indictment.

(2) Genocide – Count 2 of the Indictments

17. The elements of genocide were described above in paragraph 13. Various modes of commission of genocide are defined under Article 6 (1) of the Statute. A person who "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute" is individually criminally responsible. Instigation is urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed. In accordance with general principles of accomplice liability, instigation does not arise unless it has directly and substantially contributed to the perpetration of the crime by another person. Unlike the crime of direct and public incitement, instigation does not give rise to liability unless the crime is actually committed by a principal or principals.[38] Aiding and abetting refers broadly to any form of assistance and encouragement given to another person to commit a crime. As with instigation, aiding and abetting is a form of accomplice liability that requires direct and substantial contribution to the perpetration of the crime by another person. The assistance and encouragement may consist of physical acts, verbal statements, or even failure to act where the presence of a person in a position of authority at a place where a crime is being committed may convey approval for those crimes. The person aiding and abetting need not possess the principal's intent to commit genocide, but must at the least have knowledge of the principal's general and specific intent.[39]

18. Much of the evidence concerning the Accused goes to alleged acts of support and encouragement of soldiers and militia to engage in genocide. As detailed above, there is evidence that Bagosora, Ntabakuze and Nsengiyumva, on specific occasions after 6 April 1994, urged civilians or soldiers to kill Tutsi civilians.[40] There is evidence that Kabiligi reprimanded a soldier for not cooperating with the *Interahamwe* in the killing of Tutsi civilians.[41]

19. Evidence also exists to support the broader Prosecution theory that the Accused lent encouragement and support to elements of the armed forces and militias in furtherance of a systematic campaign to kill Tutsi civilians, which was the goal of the conspiracy described above. According to this theory of the case, the military and the militias were instrumentalities used by the Accused to execute a broad campaign of killings, of which there were many specific instances throughout Rwanda. The absence of the Accused at locations where episodes of killings took place, upon which the Defence has frequently relied in its submissions, does not necessarily preclude criminal responsibility under the various modes of commission described in Article 6 (1) of the Statute, or under the doctrine of superior responsibility prescribed by Article 6 (3).

20. The Chamber is not mandated under Rule 98 *bis* to make findings of fact as to whether the actions of the Accused did, or did not, substantially contribute to any of the episodes of genocidal killing described in the Indictments. However, on the basis of the evidence discussed in the previous section, along with all reasonably possible inferences arising therefrom, there is evidence which, if believed, could lead a reasonable trier of fact to

[38] *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 456 (with further references).
[39] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 501; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 457 (with further references).
[40] *Supra* note 35.
[41] *Id.*

conclude that the Accused espoused and supported genocidal killings.[42] Whether their support and encouragement (assuming that the evidence is believed) was sufficient to constitute instigation or aiding and abetting, or any of the other forms of liability enumerated under Article 6 (1) of the Statute, is a question of fact and law which must be determined at the end of the trial after full argument by the parties. In the meantime, the Chamber cannot say that there is insufficient evidence for any reasonable trier of fact to find the Accused criminally responsible, even for events such as those at Butare in support of which the Prosecution has not cited any evidence of immediate participation of the Accused.[43] Accordingly, the Chamber denies the Defence motions to the extent that they seek a declaration that the Accused has no case to answer in respect of specific genocidal acts for which there is no evidence of direct involvement of the Accused.

(3) Complicity in Genocide – Count 3 of the Indictments

21. Aiding and abetting genocide and complicity in genocide are substantially overlapping, if not materially identical, forms of criminal conduct.[44] In any event, it is clear that a finding of aiding and abetting genocide could also sustain a conviction for complicity in genocide. This being the case, the Chamber is of the view that the same evidence discussed in the preceding two sections, if believed, could be sufficient to sustain a finding by a reasonable trier of fact that the Accused are guilty of complicity in genocide.

(4) Incitement to Commit Genocide – Count 4 of the Nsengiyumva Indcitment

22. Only Nsengiyumva is charged with incitement to commit genocide, as prescribed by Article 2 (3)(c) of the Statute. The incitement must be "direct and public", which has been interpreted as a "call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media". To be direct, the exhortation must be more than a "vague or indirect suggestion", but, on the other hand, it need not actually lead to the genocidal act. The *mens rea* is the "intent to directly prompt or provoke another to commit genocide".[45]

23. Nsengiyumva is charged with incitement on three distinct occasions. As to the first occasion, on the night of 6-7 April 1994 (para. 6.14 of the Indictment), Witness ZF testified that he heard Nsengiyumva tell a certain Lieutenant Bizumuremyi under his command that "work had to begin to finish off the *Inyenzi*" and later that the Tutsi were evil. Shortly after speaking with Nsengiyumva, Bizumuremyi ordered soldiers to kill Tutsi civilians, including babies.[46] In light of the possible range of interpretations of the words spoken in the context, the Chamber cannot say that there is insufficient evidence upon which any reasonable trier of fact could find the Accused guilty of incitement for this event. Several witnesses testified to the second alleged act of incitement (para. 6.16 of the Indictment), at which Nsengiyumva

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[42] Presence is not a *sine qua non* of aiding and abetting liability. *Semanza*, Judgement (TC), 15 May 2003, para. 385 ("Except in the case of an 'approving spectator', the assistance may be provided before or during the commission of a crime, and an accused need not necessarily be present at the time of the criminal act").

[43] Prosecution Motion, Appendix 1, pp. 48-49; Bagosora Reply, pp. 53-54.

[44] *Semanza*, Judgement (TC), 15 May 2003, para. 394 ("In the view of the Chamber, there is no material distinction between complicity in Article 2 (3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6 (1)"); *Krstic*, Judgement (AC), 19 April 2004, paras. 138-39 ("As the Trial Chamber observed, there is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all offences punishable under the Statute, including the offence of genocide ... In this case, the two provisions can be reconciled, because the terms "complicity" and "accomplice" may encompass conduct broader than that of aiding and abetting genocide").

[45] *Akayesu*, Judgement (TC), 2 September 1998, para. 560; *Nahimana et al.*, Judgement (TC), 3 December 2003, paras. 1011-1015.

[46] ZF, T. 28 November 2002, pp. 40-42.

allegedly called for the killing of Tutsi, urged roadblocks to be reinforced, and distributed weapons to *Interahamwe*. As to the third incident (para. 6.30 of the Indictment), a witness testified that Nsengiyumva told a municipal leader during an assembly at Umuganda stadium in Gisenyi that he should reinforce roadblocks and "to warn his Muslim friends not to continue hiding Tutsi in their houses".[47] This evidence, if believed, is not insufficient to possibly lead to a finding of guilt beyond a reasonable doubt.

(5) Murder – Count 4 (civilians) and 5 (Belgian soldiers) Bagosora Indictment; Count 4 (civilians) Ntabakuze/Kabiligi Indictment; Count 5 (civilians) Nsengiyumva Indictment

24. Article 3 of the Statute enumerates nine "Crimes Against Humanity", of which the Accused are charged with five: murder, extermination, rape, persecution, and other inhumane acts. In order to qualify as a crime against humanity, these offences must satisfy two conditions under the Statute: the crime must be committed as "part of a widespread or systematic attack"; and, the attack must be against "any civilian population on national, political, ethnic, racial or religious grounds". "Widespread" is defined as massive or large-scale, involving many victims; "systematic" refers to an organized pattern of conduct, as distinguished from random or unconnected acts committed by independent actors.[48] The second requirement nourishes the *mens rea* element unique to crimes against humanity: the perpetrator must, at a minimum, know that his action is part of a widespread or systematic attack against civilians on discriminatory grounds, though he or she need not necessarily share that discriminatory intent.[49]

25. Murder is the intentional killing of a person, or intentional infliction of grievous bodily harm with knowledge that such harm will likely cause the victim's death or with recklessness as to whether death will result, without lawful justification or excuse, which leads to death.[50] An obvious distinction between a genocidal killing and murder is that the latter must be committed as part of a widespread and systematic attack (with at least knowledge of its discriminatory character), whereas the former must be committed with the specific intent to destroy, in whole or in part, the group to which the victim belongs. Much of the evidence discussed above in respect of genocide of Tutsi civilians is also probative of the requirements of murder as a crime against humanity against them. The testimony of statements by the Accused after 7 April 1994, if believed, could establish that the Accused supported and encouraged those who were killing Tutsi civilians with the requisite discriminatory intent.[51] There is also evidence capable of establishing that these killings were widespread, if not also systematic.

26. Bagosora is also charged with the murder of ten Belgian UNAMIR soldiers at Camp Kigali on the morning of 7 April 1994. There is evidence that during the time that the Belgians were being beaten and killed at Camp Kigali, Bagosora was chairing a meeting at the *Ecole Superieure Militaire* a short distance away. There is some evidence that Bagosora knew that the Belgians were at Camp Kigali and were in danger of being killed by soldiers of the Rwandan Army.[52] There are indications that he was in the direct chain of command above

[47] DO, T. 1 July 2003, p. 34.
[48] *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 477 (with further references).
[49] *Id.*, paras. 477, 484 (with further references).
[50] *Id.* para. 487 (with further references).
[51] *Supra* notes 35-37.
[52] AE, T. 16 December 2003, p. 39 ("[The Camp Commander, Nubaha] went back to the ESM running. Just at the entrance there was a meeting hall. He asked for reinforcement from ESM. There was a meeting there. He went to the ESM to -- he went to the ESM and called for help for the Belgians but in spite of that the Belgian soldiers were killed. And it took a lot because the Belgians had the kalashnikov guns ... The distance is not long [between ESM and Camp Kigali where the UNAMIR soldiers were killed], the distance between our position

those who were conducting the attack on the Prime Minister's residence on the morning of 7 April 1994, during which the Belgian officers were detained and taken to Camp Kigali.[53] There is also evidence to suggest that Bagosora was in a position to exercise control over the soldiers at Camp Kigali, and that at least one of them knew that he was nearby, but that Bagosora did nothing.[54]

27. At this stage, it is useful to recall the possibility of aiding and abetting as "an approving spectator":

> Criminal responsibility as an 'approving spectator' does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct. The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement. Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances.[55]

Given this statement of the law, and the different elements of evidence presented, the Chamber cannot say that no reasonable trier of fact could find the Accused guilty under either Article 6 (1) or 6 (3) of the Statute for murder.

(6) Extermination – Count 6 of the Bagosora and Nsengiyumva Indictments; Count 5 of the Ntabakuze/Kabiligi Indictment

28. Extermination has recently been defined by the Appeals Chamber as participation in a widespread or systematic killing of a group.[56] In so doing the Appeals Chamber emphasized that the perpetrator need not kill (by the forms of commission in Article 6 (1) of the Statute)

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position and the Kigali camp. I would say 200 to 300 metres. So even if you use a pistol, you could hear. But in that case, machine-guns and grenades were being used, so the explosions could be heard. And the multiple grenade launcher makes a lot of noise."

[53] DA, T. 17 November 2003, pp. 30-31 ("[Captain] Sagahutu [commander of the Reconnaissance Battalion, who had ordered the Presidential Guard to prevent Prime Minister Uwilingiyimana from leaving her residence] called Nzuwonemeye [who] was in a meeting [at ESM]. [Sagahutu] was asking if it was necessary to send reinforcements ... In any case, something had to be done because time was being wasted. The objective [of arresting Uwilingiyimana] had not been attained ... Nzuwonemeye said he could not take any decision, that he was going to ask for instructions so that the operation should be carried out immediately. But that was not a decision he had to take on his own. So he had to seek the opinion of those who were with him at the meeting ... The meeting had been convened by Colonel Bagosora, and instructions had to be sought from him to be able to answer Captain Sagahutu ... [Sagahutu] received an answer ... 20 to 30 minutes later ... he was asked to do everything possible to complete the mission, but that he should ensure that nobody should have access to the studios of Radio Rwanda to give any contradictory versions ... Q. Was the mission he was talking about the mission concerning the prime minister? A. Yes. Q. And who did that message come from, if you know? A. The message came from Colonel Bagosora and even the letterhead had the call sign which was used by the colonel").

[54] During the alleged killings, Bagosora is alleged to have been directing and chairing a meeting attended by all the senior military leaders of the army. Dallaire, 19 January 2003, pp. 36, 39, 41 ("It was the morning of the 7th, around 10:30ish the morning when I burst into the meeting chaired by Colonel Bagosora with General Ndindiliyimana to his side of all senior officers, commanders. I say 'all' because the room was full of the government, and government forces and gendarmerie ... Well, when I finished speaking, Colonel Bagosora took the lectern again and repeated his concerns that the security of the nation was crucial and that the commanders had to maintain control on their troops so that they would have a very reasonable resolution of the current reactions by a few units that were in Kigali, or words to that effect ... it was clear that Colonel Bagosora was giving instructions, direction, and General Ndindiliyimana acquiescing to that and that meeting broke up." Lt. Nubaha apparently knew that Bagosora was nearby, and Major Nzuwonemeye is described by one witness, DAK (T. 10 November 2003, p. 36) as having been present during the beatings and killings, and by another witness as having been at the meeting with Bagosora at ESM (DA, *supra* note 53).

[55] *Semanza*, Judgement (TC), 15 may 2003, para. 386.

[56] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 522.

any particular individual and that the victims need not be named in an indictment. The essential distinction between murder and extermination is that the latter is directed at a group collectively resulting in a mass killing, and that the forms of commission ("participation") are broader than what is required for murder. Whether the participation is sufficient to constitute extermination depends on a concrete assessment of the facts, including the actions of the perpetrator, their impact on a defined group, and awareness of the impact on the defined group.[57]

29. In light of the evidence discussed above in respect of the charge of genocide, the Chamber is satisfied that there is some evidence which, if believed, shows that each of the Accused participated in measures whose purpose and effect was to cause mass death of Tutsi civilians. In addition, there is evidence that such mass killings did, in fact, result. Those measures included ordering reinforcement of roadblocks by militia and the military for the purpose of stopping and killing large numbers of Tutsi who were in flight; urging soldiers to cooperate with the *Interahamwe* knowing that they were killing large numbers of Tutsi civilians; and supplying weapons to the *Interahamwe* knowing that they were systematically killing Tutsi civilians.[58]

(7) Rape – Count 7 of the Bagosora and Nsengiyumva Indictments; Count 6 of the Ntabakuze/Kabiligi Indictment

30. Rape is the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator.[59] Consent must be given freely and voluntarily and is assessed within the context of the surrounding circumstances. The mental element of rape is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.[60] The Accused are charged only with superior responsibility under Article 6 (3), that is, that the crime was committed by a subordinate and that the Accused "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". A person is a superior not only to those over whom he is a superior in a traditional chain of military command, but also to those over whom "he exercises effective control".[61]

31. There was testimony that rapes were committed by subordinates of Ntabakuze, and that he knew of these rapes.[62] Although the Defence has characterized this evidence as unreliable, the Chamber cannot say that the evidence is obviously incredible, such that no reasonable trier of fact could give it credit. More generally, there was evidence that rape by

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[57] *Ndindabahizi*, Judgement (TC), 15 July 2004, paras. 479, 483, 485; *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 536-547.

[58] *Supra* notes 30 to 35.

[59] *Kunarac et al.*, Judgement (TC), 10 December 1998, para. 387; *Kunarac et al.*, Judgement (AC), 12 June 2002 para. 128 ("The Appeals Chamber concurs with the Trial Chamber's definition of rape"); *Semanza*, Judgement (TC), 15 May 2003, para. 345 ("While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber"); *Kajelijeli*, Judgement (TC), 12 January 2002, para. 915 ("Given the evolution of the law in this area, culminating in the endorsement of the *Furundžija/Kunarac* approach by the ICTY Appeals Chamber, the Chamber finds the latter approach of persuasive authority and hereby adopts the definition as given in *Kunarac*"); *Kamuhanda*, Judgement (TC), 22 January 2004, para. 709.

[60] *Kunarac et al.*, Judgement (AC), 12 June 2002, para. 127; *Semanza*, Judgement (TC), 15 May 2003, paras. 344, 346; *Kajelijeli*, Judgement (TC), 12 January 2002, para. 915.

[61] *Blaskic*, Judgement (AC), 29 July 2004, para. 67.

[62] DBQ, T. 23 September 2003 p. 34; T. 25 February 2004 p. 15; XAB, T. 6 April 2004, p. 39.

soldiers and *Interahamwe* was widespread and notorious between April and July 1994.[63] The evidence discussed above of the relationship between the four Accused and the *Interahamwe* could, if believed, establish a relationship of "effective control" over the *Interahamwe*.[64] That determination must be based on findings of fact which the Chamber can only make at the end of the trial and in light of full argument by the parties.

(8) Persecution – Count 8 of the the Bagosora and Nsengiyumva Indictments; Count 7 of the Ntabakuze/Kabiligi Indictment

32. Persecution is the gross or blatant denial, on discriminatory grounds, of a fundamental right, reaching the same level of gravity as other crimes against humanity defined in the Statute.[65] Unlike the other crimes against humanity enumerated for which knowledge of the overall discriminatory nature of a widespread attack is the minimum threshold, a persecutor must himself or herself intend to discriminate on racial, religious, or political grounds.[66] Persecution may take diverse forms whose defining characteristic is the severity of deprivation of fundamental rights.[67] Examples of acts that have been found to be persecution include hate speech,[68] destruction of property or means of subsistence,[69] unlawful detention

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[63] Dallaire, T. 20 January 2004, pp. 31-33 ("Some of the sites ... and you could see by the layout of the women and so on that rape and then mutilation had happened ... that is I am speaking about my observers and myself — that young girls, young women, would be laid out with their dresses over their heads, the legs spread and bent. You could see what seemed to be semen drying or dried. And it all indicated to me that these women were raped. And then a variety of material were crushed or implanted into their vaginas; their breasts were cut off ... a number of the women had their breasts cut off or their stomach open ... I would say generally at the sites you could find younger girls and young women who had been raped or, you know, deducting that they were raped ... I would say that not many sites that were reported did not have such scenes of rape"); Beardsley, T. 3 February 2004 pp. 42-46 ("women's breasts, women vaginas had been cut with machetes ... there was rape that had taken place in addition to the killings, and the murder").

[64] *Supra* note 36.

[65] *Kupreskic et al.*, Judgement (TC), 14 January 2001, paras. 619, 621 ("[A]t a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated"); *Nahimana et al.*, Judgement (TC), 3 December 2001, para. 1072; *Semanza*, Judgement (TC), 15 May 2003, para. 347.

[66] *Nahimana et al.*, Judgement (TC), 3 December 2001, para. 1071 ("The Chamber notes that this requirement has been broadly interpreted by the International Criminal Tribunal for Yugoslavia (ICTY) to include discriminatory acts against all those who do not belong to a particular group); *Semanza*, Judgement (TC), 15 May 2003, para. 350 ("The act of persecution must have been committed on political, racial, or religious grounds. Unlike the other enumerated crimes against humanity, persecution requires a discriminatory intent. This Chamber observes that the enumerated grounds of discrimination for persecution in Article 3(h) of the Statute do not include national or ethnic grounds, which are included in the list of discriminatory grounds for the attack contained in the chapeau of Article 3"); *Kordic and Cerkez*, Judgement (TC), 26 February 2001, para. 212 ("This intent – the discriminatory intent – is what sets the crime of persecution apart from other Article 5 crimes against humanity").

[67] *Semanza*, Judgement (TC), 15 May 2003, paras. 348-349 ("Persecution may take diverse forms and does not necessarily require a physical act ... Acts of persecution must be evaluated in context, by looking at their overall cumulative effects"); *Vasiljevic*, Judgement (TC), 29 November 2002, para. 246 ("The act or omission constituting the crime of persecution may assume various forms, and there is no comprehensive list of what acts can amount to persecution. It may encompass acts that are listed in the Statute as well as acts that are not listed in the Statute. The persecutory act or omission may encompass physical or mental harm or infringements upon individual freedom"); *Kupreskic et al.*, Judgement (TC), 14 January 2001, para. 622 ("In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane". This delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute").

[68] *Nahimana*, Judgement (TC), 3 December 2001, para. 1072 ("The Chamber considers it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute ... Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of

of civilians,[70] deportation or forcible transfer of civilians,[71] and crimes of sexual violence other than rape.[72]

33. The Prosecution asserts that evidence that the Accused identified, and publicly denounced, Tutsi civilians *en masse* as the enemy was, itself, persecution.[73] Evidence of unlawful detention of civilians by *Interahamwe* has also been adduced in respect of the paragraphs cited in the count, including paragraph 5.45 of the Bagosora Indictment (which is common to the other Indictments).[74] Of course, the criminal responsibility of the Accused in respect of the latter depends on a finding that support of the *Interahamwe* is sufficient to satisfy forms of commission in Article 6 (1), or superior responsibility under Article 6 (3). As has been found above, there is sufficient evidence to preclude a determination that no such finding could be made by any reasonable trier of fact.[75]

(9) Other Inhumane Acts – Count 9 of the the Bagosora and Nsengiyumva Indictments; Count 8 of the Ntabakuze/Kabiligi Indictment

34. "Other inhumane acts" are those of comparable gravity and seriousness to the enumerated acts.[76] The act or omission must deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.[77] Inhumane acts have been

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itself, as well as in its other consequences, can be an irreversible harm"); para. 1078 ("The Chamber notes that persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms").

[69] *Blaskic*, Judgement (TC), 3 March 2003, para. 227 ("[P]ersecution may ... take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina").

[70] *Id.* para. 234 ("The unlawful detention of civilians, as a form of the crime of persecution, means unlawfully depriving a group of discriminated civilians of their freedom").

[71] *Id.* para. 234 ("The deportation and forcible transfer of civilians [as a form of the crime of persecution] means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law").

[72] *Semanza*, Judgement (TC), 15 May 2003, para. 345.

[73] Prosecution Response, para. 109; *supra* notes 29, 30 and 31.

[74] XXY, T. 11 June 2004, p. 20 ("I remember that we saw a nun who had been stopped at the roadblock in the morning, and the nun was a Tutsi. And we were asking ourselves, are they also going to kill nuns? Have they done something bad? And the *Interahamwe* told us that all the Tutsis were enemies. The nun was taken to a house near the roadblock, and I was there. It was around 5 p.m. She was screaming. We did not remain at the roadblock very long because we were sent away. And when I returned, I heard her scream inside the house, so she was calling out for help. And I was able to find out that she had been raped, because I saw her again the following day and she was sitting in front of the house").

[75] *Supra* note 36.

[76] *Bagilishema*, Judgement (TC), 7 June 2001, para. 92; *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, paras. 150-151; *Musema*, Judgement (TC), 27 January 2000, para. 232 ("The Chamber finds that an act or omission will fall within the ambit of "Other inhumane Acts", as envisaged in Article 3(i) of the Statute, provided the nature and character of such act or omission is similar in nature, character, gravity and seriousness to the other acts, as enumerated in sub-articles (a) to (h) of Article 3"). *See also* Rome Statute of the International Criminal Court, Article 7(k) which defines "other inhumane acts as "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

[77] *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, para. 151 ("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"); *Krnojelac*, Judgement (TC), 14 December 1999, para 52 (The required *mens rea* is met where the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering would result"); *Kayishema and Ruzindana*, Judgement (TC), 21 May 1999, para. 151.

found to include sexual violence,[78] mutilation, beatings and other types of severe bodily harm,[79] and the forcible transfer of civilians.[80]

35. The Prosecution contends that civilians endured deprivations of liberty falling short of detention; were lured from their hiding places with promises of safety; were stripped of clothing in public; were compelled to commit criminal acts; and were forced to endure the sight of loved ones being killed or abused. Evidence of one or more of these incidents having been inflicted by *Interahamwe* militia and soldiers between April and July 1994 has been presented by the Prosecution.[81] Whether criminal responsibility for these acts can be attributed to the Accused will, of course, depend on the ultimate findings as to the nature of their support or control over the direct perpetrator and whether the actions of the direct perpetrators were foreseeable or known to the Accused. The evidence described above concerning the connection between the Accused and the *Interahamwe* and soldiers involved is sufficient to preclude a finding that no reasonable trier of fact could ultimately conclude that the Accused were criminally responsible for these acts.

(10) Violence to Life, Health and Physical or Mental Well-Being of Civilians (Count10 of Bagosora and Nsengiyumva Indictments; Count 11 of Ntabakuze/Kabiligi Indictment); and of Ten Belgian Soldiers (Count 11 of Bagosora Indictment)

36. This charge is prescribed by Article 4 of the Statute, which criminalizes serious violations of Article 3 common to the 1949 Geneva Conventions, and of Additional Protocol II thereof. In particular, Article 4(a) criminalizes "violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporeal punishment". There are three pre-requisites for the applicability of the crimes enumerated in Article 4 (1): the existence of a non-international armed conflict on the territory of the concerned state; a nexus between the alleged violation and the armed conflict; and, the victims were not directly taking part in the hostilities at the time of the alleged violation.[82] The nexus requirement is satisfied where the perpetrator "acted in furtherance of or under the guise of the armed conflict". Factors to be considered in this regard include, *inter alia*: "the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; [and] the fact that the act may be said to serve the ultimate goal of a military campaign".[83]

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[78] *Akayesu*, Judgement (TC), 2 September 1998, para. 688 ("Sexual violence falls within the scope of 'other inhumane acts' ").

[79] *Niyitegeka*, Judgement (TC), 16 May 2003, para. 465, 467 ("[T]he acts committed with respect to Kabanda [decapitation, castration and piercing his skull with a spike] and the sexual violence to the dead woman's body [insertion of a sharpened piece of wood into her genitalia] are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole").

[80] *Krstic*, Judgement (TC), 14 December 1999, para. 52 ("[F]orcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity").

[81] DBJ, T. 24 November 2003 p. 8 ("When a victim was about to be killed, the victim was asked to undress ... That was done by all of the killers [who were *Interahamwe*]. I would say it was a system that they were using by killing people and making them feel even worse because just to shoot at them without humiliating them or torturing them, was not good enough. So they had to torture them first and then kill them later"); AS, T. 2 September 2003, p. 51 ("When Innocent was being beaten up, being tortured, *Interahamwes* [who were accompanied by one soldier] put us there so that we would watch the scene. For instance if you just turned your head so as not to see how Innocent was being tortured or how my husband was being tortured, we were hit on the head so that we can watch what was happening").

[82] *Ntagerura et al.*, Judgement (TC), 25 February 2004, para. 766; *Semanza*, Judgement (TC), 15 May 2003, paras. 354-371, 512.

[83] *Kunarac et al.*, Judgement (AC), 12 June 2002, para. 59.

37. There is evidence upon which a reasonable trier of fact could find that each of the general prerequisites for crimes enumerated in Article 4 existed at the relevant times: there is evidence of an armed conflict in Rwanda in 1994; of the close relationship between that armed conflict and the alleged crimes; and that many of the victims were civilians not taking part in the hostilities. For the reasons in the foregoing sections, there is also evidence which, if believed, could sustain a finding that crimes of violence were committed which may be criminally attributed to each of the Accused under Articles 6 (1) or 6 (3).

38. The murder of the Belgian soldiers as a crime against humanity has been discussed above (paras. 26-27). For those same reasons, the Chamber also denies the motion in respect of this count.

(11) Outrages Upon Personal Dignity (Count 12 of the Bagosora Indictment; Count 11 of the Nsengiyumva Indictment; Count 10 of the Kabiligi/Ntabakuze Indictment)

39. Article 4 (e) of the Statute criminalizes as a serious violation of Article 3 common to the 1949 Geneva Conventions, and of Additional Protocol II thereof, "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". The Accused are charged only with superior responsibility for this crime. Outrages upon personal dignity has been described as acts which "cause serious humiliation, degradation or [are] otherwise [] a serious attack on human dignity".[84]

40. In its Response, the Prosecution has identified the alleged acts which it considers relevant to this charge: forced incest, burying corpses in latrine pits; leaving infants without care after killing their guardians; and removing fetuses from the womb. The Defence has not specifically challenged the sufficiency of the evidence in relation to the different forms of the crime alleged. Having reviewed the evidence cited by the Prosecution, and in light of the foregoing discussions of the connection between each of the Accused and soldiers and the *Interahamwe*, the Chamber finds that a reasonable trier of fact could, if the evidence were to be believed, find the Accused guilty beyond a reasonable doubt of outrages upon personal dignity for one or more of the criminal acts described.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motions.

Arusha, 2 February 2005

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[84] *Id.*, para. 161("[T]he humiliation of the victim must be so intense that any reasonable person would be outraged"). The crime has been found to have been committed for using detainees as human shields or trench-diggers; forcing detainees to relieve bodily functions in their clothing; and imposing conditions of constant fear of being subjected to physical, mental, or sexual violence on detainees. *Aleksovski*, Judgement (TC), 25 June 1999, para. 229; *Kvocka et al.*, Judgement, (TC), 2 November 2001, para. 173.