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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICTR-00-55A-T
14-10-2005
(2930 - 2911)

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 13 October 2005

THE PROSECUTOR

v.

THARCISSE MUVUNYI

ICTR-2000-55A-T

DECISION ON THARCISSE MUVUNYI'S MOTION FOR JUDGEMENT OF ACQUITTAL PURSUANT TO RULE 98 *bis*

Office of the Prosecutor

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the "Chamber");

BEING SEIZED of "Tharcisse Muvunyi's Motion for Judgment of Acquittal Pursuant to Rule 98 *bis*" filed on 15 August 2005 (the "Motion");

HAVING RECEIVED the

i. "Prosecutor's Response to Tharcisse Muvunyi's Motion for Judgment of Acquittal Under Rule 98 *bis*" filed on 29 August 2005 (the "Response"); and

ii. "Tharcisse Muvunyi's Response to the Prosecutor's Reply (*sic*) to Tharcisse Muvunyi's Motion for Judgment of Acquittal Pursuant to Rule 98 *bis*" filed on 12 September 2005 (the "Reply");

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

NOW DECIDES the Motion pursuant to Rules 98 *bis* and 73 of the Rules on the basis of written submissions of the Parties.

PROCEDURAL HISTORY

1. In a Decision dated 15 July 2005, the Trial Chamber granted the Accused Tharcisse Muvunyi an extension of time until 15 August 2005 to file a motion for a judgement of acquittal pursuant to Rule 98 *bis*.[1] By the same Decision, the Chamber also granted the Prosecution an extension of time until 29 August 2005 to file its response.

2. The Prosecution concluded its case on 20 July 2005 after calling a total of 23 witnesses, including one investigator and one expert witness.[2]

SUBMISSIONS OF THE PARTIES

A. The Defence Motion

I. Summary of the Defence Arguments

3. The Defence files this Motion for judgements of acquittal as to each count of the Indictment after the close of the Prosecution's case pursuant to Rule 98 *bis*.

4. The Defence submits that the underlying purpose of Rule 98 *bis* is to end litigation on specific counts of indictments when the Prosecution fails to present sufficient admissible evidence to allow a rational fact finder to find all elements of the charged offence beyond a reasonable doubt. The Defence maintains that the sufficiency of the evidence must be

[1] See *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on Muvunyi's Motion for Extension of Time to File Rule 98 *bis* Motion", 15 July 2005.

[2] The Chamber has considered the circumstances under which Witness QX was authorised to testify in December 2003 and is satisfied that the witness's deposition is part of the record in this case.

judged in light of the indictment upon which the accused is tried, and that all that is relevant is "whether the Prosecutor presented evidence which would support a conviction under *the indictment at issue*."[3]

5. According to the Defence, the Indictment in the instant case "fails to allege any specific facts upon which a conviction can be based."[4] The Defence asserts that in the absence of such factual allegations, the jurisprudence of both the ICTR and ICTY suggests that a conviction cannot be obtained at the Trial Chamber level or sustained at the Appeals Chamber level.

II. The Application of Rule 98 *bis*

6. The Defence submits that a motion for judgement of acquittal pursuant to Rule 98 *bis* is "a challenge to the legal sufficiency of the evidence to support a conviction for a crime charged in the indictment."[5] In the view of the Defence, the test for granting such a motion is not whether a reasonable trier of fact would arrive at a conviction beyond a reasonable doubt but whether it could.[6] The Defence also examines the common law origins of Rule 98 *bis*, distinguishing between the trial chamber as a tribunal of law and the jury as a tribunal of fact.[7]

7. The Defence notes the "unusual situation" created by the requirement that trial chambers considering Rule 98 *bis* motions should examine all of the evidence but not consider the credibility of witnesses, particularly when, "as in the instant case, prosecution witnesses contradict each other."[8] According to the Defence, the Indictment in this case "fails to meet the Tribunal's pleading requirements both by failing to allege facts supporting the allegations ...and by failing to plead its legal theories of criminal liability with sufficient specificity."[9] The Defence characterises the Prosecution's method as a "kitchen sink approach" which leaves the Indictment "ambiguous at best."[10]

8. On the concept of personal criminal liability pursuant to Article 6(1) of the Statute,[11] the Defence states that since the Indictment "does not allege whether it charges Muvunyi with personally committing crimes, ordering crimes or otherwise personally engaging in criminal conduct", it fails to meet the minimum requirements, is insufficient and will not sustain a conviction.[12] With respect to the notions of accomplice liability and joint criminal enterprise liability, the Defence argues that "[n]o evidence was presented as to Muvunyi's liability under Article 6(1)."[13] It submits that "by pleading everything but the kitchen sink", the Prosecution has effectively failed to clearly inform the Accused of the

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[3] Para. 2.
[4] Para. 3
[5] Para. 6.
[6] Para. 6, citing *The Prosecutor v. Jelisic*, Case No. IT-95-10-A, Judgement, 5 July 2001; *The Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Motions for Acquittal, 2 February 2005.
[7] Paras. 7 a. – g. citing *The Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004.
[8] Para. 8.
[9] Para. 25.
[10] Para. 26.
[11] Paras. 30 – 31.
[12] Para. 32.
[13] Para. 36.

exact nature and cause of the allegations against him.[14] The Defence also submits that the Prosecution should "suffer the consequences" of intentionally and knowingly placing itself in the position of trying a case on an indictment which will not support convictions pursuant to Article 6(1).[15]

9. The Defence submits that in order to charge a person with criminal responsibility as a superior pursuant to Article 6(3) of the Statute, the Prosecution must demonstrate a number of elements in the indictment. These include showing that the Accused is a superior of subordinates sufficiently identified over whom he had effective control and for whose acts he is alleged to be responsible.[16] According to the Defence, although the Prosecution pleaded in the Indictment that Muvunyi was the Commander of the *École des Sous-Officiers* (ESO) and responsible for the acts of subordinates in his command, the Prosecution fails to either identify any subordinates under Muvunyi's command or any acts of those subordinates for which the Prosecution asserts Muvunyi is criminally responsible. The Defence maintains that the Indictment "and the later filed Schedule of Particulars fail to specify what Muvunyi did or failed to do raising criminal liability pursuant to the theory of superior responsibility."[17]

III. Evidence in Support of Allegations in the Indictment

10. The Defence challenges the sufficiency of evidence provided by the Prosecution to support nine specific events alleged in the Indictment. These include: i) the meeting of ESO Officers alleged in paragraph 3.23 of the Indictment; ii) the sensitisation meetings (paragraphs 3.24 – 3.26); iii) the events at the Benebikira Convent at Huye Commune (paragraphs 3.27 and 3.40); iv) the events at the University Hospital in Butare (paragraph 3.29); v) the events at roadblocks in Butare Prefecture (paragraph 3.34); vi) the events at the University of Butare (paragraph 3.34(i)); vii) the events at the Ngoma Camp and the ESO (paragraphs 3.36 and 3.37); viii) the events at the Ngoma Parish (paragraphs 3.44 – 3.46); and ix) the events at the *Groupe Scolaire*, Butare (paragraph 3.48).[18]

11. In each instance the Defence argues that the Prosecution Witnesses "failed to give specific testimony as to the identity of the victims that resulted from the acts or omission of the Accused."[19] The Defence also argues with respect to these allegations that "there was no specificity as to how the Accused incurred liability under Article 6(1) or Article 6(3)."[20] In the end, the Defence submits that "there is no evidence that the Accused planned, instigated, ordered, committed, or otherwise aided or abetted in the planning, preparation, or execution" of the massacres.[21]

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[14] Para. 38.
[15] Para. 38 a. – c. citing *The Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Judgement, 23 October 2001; *The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, 29 July 2004; and *The Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005.
[16] Para. 40.
[17] Para. 42.
[18] Paras. 56 – 75.
[19] Para. 59.
[20] Para. 61.
[21] Para. 75.

IV. Evidence in Support of the Counts in the Indictment

12. With respect to Count 1: Genocide, the Defence asserts that "the Prosecutor presented no evidence that Muvunyi personally committed genocide against *anyone*"[22] and argues that based on Muvunyi's "demonstrated lack of intent" to commit genocide, the Trial Chamber should grant his Rule 98 *bis* Motion as to Count 1 of the Indictment.[23]

13. On Count 2: Complicity in Genocide, the Defence argues that the record in the instant case contains "no evidence that Muvunyi provided any assistance that substantially aided the commission of the crime of genocide" or that he "provided substantial assistance *with the knowledge* that the perpetrators were acting with genocidal intent."[24] Therefore, the Defence submits, the Trial Chamber should grant a judgement of acquittal as to this count of the Indictment.

14. Regarding Count 3: Direct and Public Incitement to Commit Genocide, the Defence alleges that the record "does not contain any evidence that Muvunyi made any speeches which could be construed as direct and public incitement to commit genocide during 1994"[25] and requests the Trial Chamber to grant the Rule 98 *bis* Motion as to Count 3 of the Indictment.[26]

15. As concerns Count 4: Rape as a Crime Against Humanity, the Defence asserts that none of the Prosecution Witnesses were specifically presented "as being victims of rape as crimes against humanity for which the Accused is responsible pursuant to Article 6(3)" and that the alleged victims "failed to identify as perpetrators any person for whom the Accused might arguably be responsible under Article 6(3)."[27]

16. With respect to Count 5: Other Inhumane Acts, the Defence submits that no evidence was presented to support a conviction under this count.[28]

17. The Defence concludes that all the counts in the Indictment suffer from the same defect, namely that they fail to allege "any acts by Muvunyi with sufficient specificity to support a conviction."[29]

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[22] Para. 87.
[23] Para. 88.
[24] Para. 91 – 97, citing *The Prosecutor v. Mpambara*, Case No. ICTR-2001-65-I, Decision on the Prosecutor's Request to File an Amended Indictment, 4 March 2005, para. 19; and *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, paras. 394, 398.
[25] Para. 105.
[26] Para. 106.
[27] Para. 108.
[28] Para. 109.
[29] Paras. 112 – 119, citing *The Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgement, 28 April 2005, para 526; *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, paras. 326, 328, 330, 331, 332; *The Prosecutor v. Kunarac*, Case No. IT-96-23-A, Judgement, 12 June 2002, paras. 91, 95, 100; *The Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgement, 16 May 2003, para. 442.

B. The Prosecution's Response

I. The Scope of Rule 98 *bis*

18. The Prosecution submits that a motion for acquittal is premised on the presumption of innocence guaranteed by Article 20(3) of the Statute and on the fundamental principle that the burden is on the Prosecution to prove the guilt of the Accused beyond a reasonable doubt.[30] It argues that at this stage in the proceedings, all that is required of the Prosecution is to establish a *prima facie* case against the Accused and that once this is done, then it is incumbent on the Trial Chamber to require the Accused to answer the charges against him.[31]

19. According to the Prosecution, in assessing whether there is sufficient evidence upon which a reasonable trier of fact could enter a conviction, the Chamber must "assume that the prosecution's evidence is entitled to credence unless incapable of belief."[32] The Prosecution also asserts that the object of inquiry under Rule 98 *bis* is simply to determine whether the evidence, assuming that it is true, could not possibly sustain a finding of guilt beyond a reasonable doubt.

20. The Prosecution asserts that contrary to the submission by the Defence, the current and applicable standard as enunciated by the *Bagosora* Trial Chamber is for the evidence to be probative of one or more of the required elements of a count.[33] The Prosecution adds that any further assessment of the "weakness" or otherwise of the evidence will draw the Trial Chamber into making a determination on the credibility or reliability of the evidence, "which is clearly outside the purview" of Rule 98 *bis*.[34] According to the Prosecution, "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 on it."[35] In addition, the Prosecution argues that the approach of inquiring into the sufficiency of the evidence in relation to each paragraph of the Indictment is neither necessary under Rule 98 *bis* nor proper in the instant case given that many paragraphs in the Indictment are interdependent.[36]

II. Sufficiency of Notice

21. The Prosecution also notes that a motion for a judgement of acquittal pursuant to Rule 98 *bis* is not the proper forum to raise the issue of sufficiency or otherwise of notice or challenges to the Indictment. It asserts that such matters are to be raised under the ambit

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[30] Para. 7.
[31] Paras. 8 – 9, citing *The Prosecutor v. Bagosora et al*, Case No. ICTR-1998-41, para. 6; *Jelisic v. The Prosecutor*, Appeals Judgement, 5 July 2001, para. 37; *The Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-1998-42-T, para. 26
[32] Para. 11, citing *Jelisic v. The Prosecutor*, Appeals Judgement, 5 July 2001, para. 55; *The Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, "Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal", 25 September 2002, para. 18.
[33] Para. 15, citing *The Prosecutor v. Bagosora*, Case No. ICTR-1998-41-T, Decision on Motion for Judgement of Acquittal, 2 February 2005.
[34] Para. 15, citing *The Prosecutor v. Kunarac et al*, Decision on Motion for Acquittal, 3 July 2000.
[35] Para. 18, quoting *The Prosecutor v. Bagosora*, Case No. ICTR-1998-41-T, Decision on Motion for Judgement of Acquittal, 2 February 2005, para. 11.
[36] Paras. 21, 26.

of Rule 73 *bis* within the time limits prescribed under the Rules and not halfway through the trial.[37] The Prosecution also submits that these issues have been ventilated by both Parties up to the highest levels and that the decision by the Appeals Chamber renders these matters *res judicata*.[38]

Count 1: Genocide

22. The Prosecution submits that the Accused is charged with genocide under Articles 6(1) and 6(3) of the Statute and provides a definition of genocide based on Article 2(2).[39] It asserts that it has adduced evidence that from April to July 1994 there was widespread and systematic killing of Tutsis in Rwanda and that during a large portion of that period the Accused was the Commander of the ESO as well as the *Commandant de place* of Butare and Gikongoro *Préfectures* who by his acts and/or omissions intended the death of Tutsis. It also submits that evidence was adduced by its witnesses showing that a number of persons who committed the acts of genocide were Platoon Commanders and officers in the ESO in April 1994.[40]

Count 2: Complicity in Genocide

23. The Prosecution asserts that as an alternative count to genocide, the Accused is charged with complicity in genocide under Article 2(3)(e) of the Statute and that the *actus reus* of complicity is "comparable to aiding and abetting, instigating or procuring for genocide."[41] The Prosecution also states that the essence of the *mens rea* of complicity in genocide is that the accomplice knew of the assistance he was providing in the commission of the principal offence, and that it is not necessary for the accomplice to affirmatively desire that the principal offence be completed.[42] It submits that the testimony provided by witnesses demonstrates that the Accused was aware of the killing of large numbers of Tutsi civilians and that he participated in planning meetings and took active steps to facilitate the killing by others, including through the distribution of firearms to members of the population.[43]

Count 3: Direct and Public Incitement to Commit Genocide

24. The Prosecution argues that this crime is punishable under Article 2(3)(c) of the Statute and that witnesses testified that the Accused traversed Butare *Préfecture* in the company of other local officials inciting the population to attack and kill the *Inyenzi*. The Prosecution states that the testimony of these witnesses indicates that the population understood Muvunyi's statements as a direct and public incitement of Hutus to start killing their Tutsi neighbours and looting their property. According to the Prosecution, the witnesses also testified that Muvunyi stated that he was in possession of some arms and that these weapons were later distributed by the Accused and used in killing some

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[37] Para. 19, citing *The Prosecutor v. Semanza*, Case No. ICTR-1997-20-T, "Decision on the Defence Motion", 27 September 2001, para. 18.
[38] Para. 19.
[39] Paras. 32 – 33.
[40] Paras. 36 – 53.
[41] Paras. 54 – 55, citing *The Prosecutor v. Semanza*, Case N o. ICTR-1997-20-T, 15 May 2003, paras. 393, 395.
[42] Para. 56, citing *Prosecutor v. Akayesu*, Case No. ICTR-1996-4-T, Judgement, 2 September 1998, paras. 538 – 539, 544; *The Prosecutor v. Semanza*, Case N o. ICTR-1997-20-T, 15 May 2003, paras. 394 – 395.
[43] Paras. 54 – 60.

people.[44] Additionally, the Prosecution submits that the expert testimony of socio-linguist Evariste Ntakirutimana demonstrates that the proverbs and phrases used by the Accused were utterances which allowed the speaker "to capture the attention of the addressee" and showed "a denigration of the Tutsi people."[45]

Superior-Subordinate Relationship Under Article 6(3)

25. The Prosecution submits that Article 6(3) of the Statute imposes liability for a superior's failure to prevent a subordinate from committing offences under the Statute or for failure to punish a subordinate for committing such offences and that criminal liability is incurred only where the obligation to act exists.[46] The Prosecution states that the testimony given by its witnesses described in detail the command structure and the existence of a superior-subordinate relationship not just between the Accused and the men at the ESO but also between him and those at the Ngoma military camp, the Tumba *gendarmerie* and the Gikongoro *gendarmerie*.[47]

Count 4: Rape as a Crime Against Humanity

26. The Prosecution submits that the Accused is charged with rape under Article 6(3) of the Statute.[48] According to the Prosecution, there is evidence on each of the elements of this crime, including evidence that Tutsi civilians were sexually assaulted and subjected to forcible sexual intercourse in Butare *Préfecture* throughout the period of April to July 1994.[49] The Prosecution also asserts that Witnesses TM, QY and AFV testified to having been raped by soldiers from the ESO who were under the command of the Accused and described the "coercive circumstances" of the rapes.[50] The Prosecution states that the rapes occurred within a close distance of the ESO and that they were so widespread that the Accused knew or ought to have known of such acts and that he did nothing to prevent them or to punish the perpetrators.[51]

Count 5: Other Inhumane Acts as Crime Against Humanity

27. The Prosecution states that the Accused is charged with other inhumane acts as defined in Article 3(i) of the Statute.[52] It submits that while the jurisprudence on this particular crime is not yet settled, the Trial Chamber could reach a finding that sufficient evidence has been adduced to show that there was "a pattern of treatment which deprived citizens

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[44] Paras. 64 – 68, quoting from the Transcript of 31 May 2005, pp. 3 – 9, and Transcripts of 9 June 2005, pp. 3 – 6, 20.
[45] Para. 69, quoting from the Transcript of 9 June 2005, pp. 20 – 21.
[46] Para. 71, citing the ILC Draft Code 1996; International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz et al, Eds, 1987), para. 3537; *Celebici* Judgement, para. 334.
[47] Paras. 73 – 77, quoting Transcripts of 18 July 2005 (ICS); Transcripts of 8 March 2005; Transcripts of 19 July 2005 (ICS); Transcripts of 6 June 2005.
[48] Paras. 78 – 80, citing *Kunarac* Appeals Judgement, paras. 127 – 128; *The Prosecutor v. Akayesu*, Case No. ICTR-1996-4-T, Judgement, 2 September 1998, paras. 596 – 598, 686 – 688; *The Prosecutor v. Musema*, 27 January 2000, paras. 220 – 221, 226 – 229; *The Prosecutor v. Semanza*, Case N o. ICTR-1997-20-T, 15 May 2003, paras. 344 – 346.
[49] Para. 81.
[50] Para. 82, emphasis added.
[51] Paras. 82 – 89.
[52] Para. 90.

of the right to act without unlawful interference or influence."[53] The Prosecution points in particular to the testimony of Witnesses YAN and YAO, who stated that they received and observed cruel and degrading treatment at the hands of soldiers from the ESO under the command of the Accused.[54]

Conclusion

28. The Prosecution argues that there is an abundance of evidence against the Accused and that the "persuasive burden" on the Defence is to show that there is no evidence which might lead to a conviction. The Prosecution asserts that what the Defence needed to do to satisfy the requirements of Rule 98 *bis* was to show that the Prosecution's evidence, if believed, is insufficient to sustain a conviction. In the view of the Prosecution, the Defence has failed to demonstrate through the Motion that the Prosecution's case has completely broken down. Therefore, according to the Prosecution, the Motion is without merit or proper foundation and ought to be denied in its entirety.[55]

***C. The Defence Reply*[56]**

29. The Defence submits that the purpose of its Reply is to clarify issues and to discuss matters raised in the Prosecution's Response.[57] The Defence alleges that the core of the Prosecution's case stems from Muvunyi's authority and is focused on a form of responsibility under the theory that Muvunyi had the authority, by his position alone, to prevent or punish crimes and not only failed to do so but helped plan and encourage the crimes. The Defence argues that the evidence supporting this proposition is "shaky at best and misrepresented at worst."[58] It submits that the evidence fails to show that Muvunyi was ever appointed to the post of Commander of ESO, or that he replaced Marcel Gatsinzi as the *de jure* Commander of ESO.[59]

30. According to the Defence, the Prosecution blurs and mixes the concepts of individual direct criminal responsibility as defined in Article 6(1) of the Statute and superior responsibility as defined in Article 6(3). The Defence states that the Prosecution's argument seems to be that the Accused as the Commander of ESO is guilty because there must have been a plan for genocide and other crimes by the Government and Muvunyi is part of that plan by his mere appointment and presence alone.[60] The Defence also states that this mixing of Article 6(1) liability with Article 6(3) liability is "an improper attempt to mix apples and elephants", and notes that the ICTY Appeals Chamber has clearly held that they are separate forms of liability.[61]

31. The Defence states that "given the time of the crimes alleged in the indictment – and within the Tribunal's subject matter jurisdiction, imposition [of] criminal liability under such a theory would violate the principle of *nullum crimen sine lege* and in effect create

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[53] Para. 93.
[54] Paras. 94 – 98.
[55] Paras. 102 – 105.
[56] Only new arguments not previously stated in the Motion are summarised in this section.
[57] Para. 1.
[58] Para. 15.
[59] Para. 15 b,
[60] Para. 16.
[61] Para. 18 a., citing *The Prosecutor v. Blaskic*, Case No. IT-1995-14-A, Judgement, 29 July 2004, para. 91.

ex post facto criminal liability."[62] The Defence argues that unlike the International Military Tribunal at Nuremberg, which had the jurisdiction to declare groups illegal and to punish membership in those groups, Article 6(2) of the Statute of this Tribunal limits its jurisdiction to determining whether individuals are responsible for crimes. Thus, the Prosecution must show how Muvunyi is guilty by proving beyond a reasonable doubt his acts of commission or omission creating criminal liability.[63]

32. On each individual count of the Indictment, the Defence reiterates the submissions made in its Motion and asserts in each case that there is insufficient evidence provided by the Prosecution to support that count. The Defence argues that the Prosecution has failed to show a legal basis for convictions for the counts with which Muvunyi is charged, and requests the Trial Chamber to grant relief in the form of judgements of acquittal as to each count in the Indictment.[64]

DELIBERATIONS

33. The Chamber recalls its decision of 24 June 2005[65] admitting the Prosecution's Schedule of Particulars.

Applicable Legal Standards Under Rule 98 bis

34. The Chamber notes that the Motion is brought under 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.

35. The Chamber further notes that in interpreting a substantively identical provision in the ICTY Rules, the Appeals Chamber defined the scope of Rule 98 *bis* as follows:

> 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'. 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.[66]

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[62] Para. 19, citing case law from the United States of America.
[63] Para. 21.
[64] Paras. 45 – 46.
[65] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "Decision on the Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber", 24 June 2005.
[66] *Prosecutor v. Jelisic*, IT-95-10-A, Appeal Judgment, 5 July 2001, Para. 37; *Prosecutor v. Delalic et al.*, IT-96-21-A, Appeal Judgment, 20 February 2001, Para. 434. *See also Prosecutor v. Bagosora*, Case No.: ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005, Para. 6.

36. The Chamber is of the opinion that sufficiency of the Prosecution evidence is the key to determining whether a Rule 98 *bis* motion should be granted, and a judgement of acquittal will only be entered where the Prosecution evidence, if believed, is insufficient to sustain a conviction on a particular count of the indictment.[67] The jurisprudence suggests three scenarios under Rule 98 *bis*. First, where the Prosecution brings some evidence in support of a count that, if believed, could allow a reasonable trier of fact to convict beyond a reasonable doubt on a particular count, then the motion should be denied as to that count.[68] The Chamber recalls that generally, sufficiency of evidence should be determined without assessing its credibility and reliability; assessment of credibility and reliability is to be made at the end of trial, in light of all the evidence.[69]

37. The second scenario arises where the Prosecution has adduced some evidence, but it is so incapable of belief that a reasonable trier of fact could not rely upon it to sustain a conviction.[70] The Chamber notes that this is an exception to the general rule against assessing credibility and reliability under Rule 98 *bis*, and only arises where the Prosecution's case can be said to have "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."[71] In such circumstances, a judgement of acquittal pursuant to Rule 98 *bis* should be entered.

38. Under the third scenario, where no evidence has been adduced in support of a count, a judgement of acquittal should be entered for that count.[72] The Chamber notes that it must determine which scenario applies to each count of the Indictment.

39. The Chamber recalls that the Prosecution's evidence must be "actually probative of the elements of the offence charged" in order to sustain a count based on that crime.[73] Thus, a judgement of acquittal shall be granted if an "essential ingredient for a crime was not made out in the Prosecution's case."[74] But, there is no need to look at each paragraph of the indictment. Rather, the evidence should be examined in relation to counts.[75] The Chamber considers the distinction between paragraphs and counts especially important where, as here, paragraphs of the Indictment are "inter-dependent, narrating disparate material facts which, when viewed as a whole", show the Accused committed some crime.[76] The Chamber notes that it "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" of the Indictment.[77]

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[67] *Butare.*, Para. 71.
[68] *Id.*
[69] *Id.*
[70] *Id.; Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98 *Bis* of the Rules of Procedure and Evidence, 20 August 2002, Para. 19;
[71] *Kamuhanda*, Para. 19; *see also Bagosora*, Para. 6; *Butare*, Para. 71; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, Decision on Defence Motions for Judgment of Acquittal, 6 April 2000, Para. 28 (ICTY).
[72] *See e.g., Butare*, Para. 71.
[73] *Bagosora*, Para. 10.
[74] *Media*, Para. 19.
[75] *Bagosora*, Para. 8.
[76] *Id.*, Para. 9.
[77] *Id.*, Para. 9.

40. The Chamber recalls that the Prosecution's evidence must be evaluated as a whole, looking to "the totality of the evidence."[78] Moreover, the Chamber can draw any inferences from the Prosecution's evidence that a reasonable trier of fact could make.[79] Finally, the Chamber is of the view that a finding that the Prosecution's evidence is not obviously incredible does not mean the Chamber cannot find that the evidence was neither credible nor reliable at the end of trial.[80]

41. With respect to alleged defects in the Indictment and contrary to the arguments raised by the Defence,[81] the Chamber notes that a 98 *bis* motion is not the proper means for moving to quash the Indictment, or asking for any further review of the Indictment.[82] Moreover, Rule 98 *bis* does not authorize the Chamber to explore issues regarding sufficiency of notice to the Accused.[83] Such issues "[should] be raised under Rule 72 within the time limits prescribed therein." As stated in *Semanza*, "It is wholly unacceptable to raise such matters half-way through the trial."[84]

42. On the Defence suggestion that where Prosecution witnesses contradict each other and the contradictions are not reconcilable the Trial Chamber must "have a reasonable doubt" and therefore must acquit under Rule 98 *bis*,[85] the Chamber recalls that contradictory evidence "may nevertheless be reliable, at least in part", and thus, "there is no justification for discounting these types of evidence on a motion to acquit."[86]

43. With respect to the Defence argument regarding reliance on circumstantial evidence,[87] the Chamber finds that this argument ignores the "guiding principle" under Rule 98 *bis*, which "is that Prosecution evidence is entitled to credence unless the Chamber determines that no reasonable trier of fact could rely upon it."[88] Therefore, while the Defence may have accurately described the standard for final judgement, it is not the standard for a judgement of acquittal under Rule 98 *bis*. Rather, under 98 *bis*, acquittal is improper if guilt beyond a reasonable doubt was one reasonable conclusion based on the evidence.[89]

44. Having established the legal standard under which motions for judgements of acquittal pursuant to Rule 98 *bis* are evaluated, the Chamber will now examine the individual counts in the Indictment.

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[78] *Id.*, Para. 11.
[79] *Id.*
[80] *See e.g., id.*, Para. 6.
[81] The Chamber has examined the Defence submissions in that connection and finds them not to be relevant to its determination of the Rule 98 *bis* Motion.
[82] *See e.g., Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Defence Motion for a Judgement 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 Judgement of Acquittal, 27 September 2001, Para. 18; *Prosecutor v. Ntagerura, et al. (Cyangugu)*, Case No. ICTR-99-46-T Separate And Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant To Rule 98 *Bis*, 13 March 2002, Para. 6.
[83] *Bagosora*, Para. 7.
[84] *Semanza*, Para. 18.
[85] Motion, Para. 8.
[86] *Bagosora*, Para. 10.
[87] Motion, Para. 9.
[88] *Bagosora*, Para. 10.
[89] *Butare*, Para. 70 (quoting *Jelisic*, Para. 37, and *Delalic et al.*, Para. 434). *See also Bagosora*, Para. 6. (quoting *Jelisic*)

Count 1: Genocide

45. Count 1 of the Indictment charges the Accused Tharcisse Muvunyi with Genocide following a series of specifically described acts or omissions through which he is alleged to be responsible for killing and/or causing serious bodily and mental harm to members of the Tutsi population, with the intent to destroy, in whole or in part, the Tutsi ethnic group. The Prosecution relies on paragraphs 2.2, 2.3, 3.10(ii)-3.10(v), 3.15, 3.17, 3.19, 3.20 - 3.30, 3.31, 3.32, 3.36- 3.38, 3.40, 3.41-3.41 (i), 3.42, 3.43, 3.46, 3.48, 3.49, 3.50, 3.51 and 3.52, pursuant to Article 6(1) of the Statute; and in paragraphs 2.2, 2.3, 3.10(ii)-3.10(v), 3.17, 3.19, 3.20-3.30, 3.31, 3.32-3.34(i), 3.35-3.43, 3.45 and 3.52, pursuant to Article 6(3) of the Statute.

46. Under Article 2(2) of the Statute, Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

    a. Killing members of the group;
    b. Causing serious bodily or mental harm to members of the group;
    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 children of the group to another group.

47. Pursuant to 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 Genocide or any of the other crimes referred to in Articles 2 to 4 of the Statute, shall be individually responsible for the crime.

48. Under Article 6(3) of the Statute, the fact that any of the crimes enumerated in Articles 2 to 4 "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."

49. The Chamber is of the opinion that 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."[90] Under Article 6(3), a civilian or military superior, with or without official status, may be held criminally responsible for crimes committed by subordinates under his effective control.[91] The Chamber recalls the Appeals Chamber's statement in *Kajelijeli* that "under the effective control test, superiors, whether military or civilian, must have the *material* ability to prevent or punish criminal conduct."[92]

50. The Chamber has examined the evidence presented by the Prosecution in support of Count 1 of the Indictment (Genocide) and notes that of the 23 witnesses called by the Prosecution, at least 18 testified in support of the count of genocide. In chronological order, Witnesses QX, KAL, YAA, QCQ, YAO, XV, CCR, CCQ, YAN, YAQ, YAP,

[90] *Blaskic*, Judgement (AC), 29 July 2004, para. 67.
[91] *Bagilishema*, Motifs de l'Arrêt, AC, paras. 50, 51; *Kayishema and Ruzindana*, Judgement, AC, para. 294; *Musema*, Judgement, TC, para. 148. *See also Celebici*, Judgement, AC, paras. 192-196.
[92] *Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, (AC), 23 May 2005, para. 86.

CCP, QBE, TM, TQ, YAK, QCM and NN each gave testimony of acts such as those defined in Article 2(2) of the Statute.

51. These Prosecution Witnesses testified, among other things: that the Accused was the Commander of the *École des Sous-Officiers* (ESO) in Butare and Area Commander of Butare *Préfecture* and Gikongoro areas, with authority over all soldiers, *gendarmes* and other military personnel in the area;[93] that the Accused was part of a Government plan and conspiracy to exterminate the Tutsi ethnic group; that the Accused encouraged and incited soldiers and others under his command to carry out acts of genocide against the Tutsi population;[94] and that the Accused failed to prevent attacks by military personnel against the civilian population or to punish the perpetrators of such acts.[95]

52. At this stage of the proceedings, without being drawn into an assessment of the credibility and reliability of each witness, the Chamber is satisfied that there is sufficient evidence which, if believed, could sustain a conviction of the Accused pursuant to his responsibility under Articles 6(1) and 6(3) on the count of genocide.

Count 2: Complicity in Genocide

53. Count 2 of the Indictment charges the Accused with complicity in genocide under Article 2(3) (e) of the Statute. The Prosecution relies on paragraphs 2.2, 2.3, 3.1(ii) -3.10(v), 3.15, 3.17, 3.19, 3.20-3.30, 3.31, 3.32, 3.36-3.38, 3.40, 3.41-3.41(i), 3.43, 3.46, 3.48-3.52

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[93] For example, witness NN testified that the Accused, Lieutenant Colonel Tharcisse Muvunyi replaced Colonel Gatsinzi as Commander of ESO in April 1994 (T. 18 July 2005, p. 23 (in closed session)) and that the commander of the ESO was the commander of the entire Butare, Gikongoro military region with authority over Ngoma Camp, the Tumba gendarmerie in Butare and the gendarmerie camp in Gikongoro (T. 18 July 2005, p. 12 (in closed session)).

[94] For example, Prosecution Witness YAQ gave evidence that on 24 April 1994, he was part of a group of civilians manning a roadblock in Ramba Cellule, Kibilizi secteur. (T. 31 May 2005, p42). At about 1.00p.m., a red Toyota vehicle carrying a group of civilian and military officials, passed by the roadblock. (T. 31 May 2005, p5, 8). The officials in the vehicle included the Accused, Colonel Alphonse Nteziryayo, Nsabimana who was later appointed *préfet* of Butare, and other soldiers. (T. 31 May 2005, p3). Later on the same day, YAQ attended a meeting where the Accused addressed the population, urging them to start killing the Tutsi. According to Witness YAQ, Muvunyi said "Tomorrow, very early in the morning, if I do not find any bodies, any dead bodies at this roadblock, I will conclude that you are all Tutsi. I myself will bring soldiers, and we will allow people from Shyanda to come here and they will even kill you." (T. 31 May 2005, p6). YAQ testified that all those present at the meeting understood what the Accused meant, and that the next day, the killing of Tutsi by Hutu began. (T. 31 May 2005, p7). Witness YAQ himself participated in these killings. (T. 31 May 2005, p41).

[95] For example, Witness YAP testified that a certain soldier from ESO named Bizimana (alias Rwatsi) was training Burundians at the Butare University Hospital on how to handle weapons. (T. 6 June 2005, p 2-3). YAP testified that he reported this matter to the Medical Officer of the Hospital, one Jotham Hakizumukiza who promised to inform the ESO command. (T. 6 June 2005, p3). Three days later, Hakizumukiza told YAP that he had contacted the Accused, the Commander of ESO, but that the latter replied that it was not possible to punish a soldier during wartime. (T. 6 June 2005, p3-4). Witness NN testified that ESO soldiers were involved in a massacre at University Hospital in May 1994 that resulted in the killing of Tutsi staff members as well as wounded Tutsis staying in tents outside the hospital. (T. 18 July 2005, p. 53 (in closed session)). In addition, Prosecution Witness QBE testified that when the *Groupe Scolaire* was attacked during the second half of April 1994, he decided to seek assistance. Witness QBE therefore called the ESO Camp to request assistance and asked to speak to the commander. (T. 15 June 2005, p. 22 (in closed session)). He later learned that he spoke with Tharcisse Muvunyi. (T. 15 June 2005, p. 24 (in closed session)). Tharcisse Muvunyi promised to come to the rescue with other people. Prosecution Witness QBE and the other people at the *Groupe Scolaire* waited the entire night, but no one ever came. (T. 15 June 2005, p. 23 (in closed session)). According to Witness YAI, Tharcisse Muvunyi, as a senior security officer, "was in a position such that nobody could contradict him", especially because of the prevailing insecurity. (T. 25 May 2005, p. 39).

of the Indictment to establish the Accused's liability for complicity under Article 6(1) of the Statute.

54. The Prosecution also relies upon paragraphs 2.2, 2.3, 3.1(ii) -3.10(v), 3.17, 3.19, 3.20-3.30, 3.31, 3.32-3.34(i), 3.35, 3.36-3.38, 3.39, 3.40, 3.41-3.41(i), 3.42, 3.43, 3.45, 3.46, 3.48 to establish Muvunyi's liability for complicity as a superior under Article 6(3). The Prosecution relies on the evidence of Witnesses NN, YAA, KAL, TQ, QBE, YAQ and YAP to prove the charge of complicity in genocide.

55. The Chamber has considered the prior jurisprudence of the Tribunal and agrees with the view expressed by the Trial Chamber in *Semanza* that "complicity to commit genocide under Article 2(3)(e) refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide. The accused must have acted intentionally and with the awareness that he was contributing to the crime of genocide, including all its material elements."[96]

56. The Chamber agrees with the meaning and definitional elements of complicity articulated in the prior jurisprudence of the Tribunal.

57. The Chamber is of the view that the same evidence discussed in the preceding section regarding Count 1, Genocide, is also relevant to Count 2, Complicity in Genocide, and, having considered that evidence, concludes that there is sufficient evidence which, if believed, could sustain a conviction of the Accused for his responsibility under Articles 6(1) and 6(3) on the count of complicity in genocide.

Count 3: Direct and Public Incitement to Commit Genocide

58. Count 3 of the Indictment charges the Accused with Direct and Public Incitement to Commit Genocide, stipulated as a crime under Article 2(3)(c) of the Statute. The Prosecution relies on paragraphs 3.23 to 3.25 and 3.32 of the Indictment to establish liability for direct and public incitement under Article 6(1) of the Statute.

59. The Chamber recalls the definition of Direct and Public Incitement to Commit Genocide given in the *Akayesu* Trial Chamber Judgement:

> 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 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.[97]

60. The Chamber notes that the direct element must be viewed "in the light of its cultural and linguistic context" and is to be assessed on a "case-by-case basis, in light of the culture of Rwanda, and the specific circumstances of the instant case."[98] The Chamber will do so by "focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof."[99]

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[96] *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para. 395.
[97] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement (TC), 2 September 1998, para. 559.
[98] *Ibid.*, para. 557-558.
[99] *Ibid.*, para. 557-558.

61. The public element depends on two factors: (i) "the place where the incitement occurred"; and (ii) whether or not attendance was "selective or limited".[100] The *mens rea* for this crime is "the intent to directly prompt or provoke another to commit genocide", and the inciter must himself have the specific intent to commit genocide.[101] When considering the evidence adduced by the Prosecution, the Chamber is mindful that direct and public incitement to commit genocide is an inchoate offence, and unsuccessful acts of incitement can still be punished.[102]

62. The Accused is charged with incitement regarding several distinct meetings, including several sensitisation meetings in various locations throughout *Butare* secteur. Witnesses CCR, YAI, CCP, and YAQ testified that during the relevant period they attended meetings at which the Accused made speeches inciting the Hutu population against the Tutsis.[103]

63. In addition to these witnesses' testimonies, the Prosecution adduced the expert testimony of Dr. Evariste Ntakirutimana, a socio-linguist who testified that many of the Accused's public statements and his use of proverbs show that the Accused intended to incite his audience to violence against Tutsis, and that, under the circumstances, his audience would have understood this message.

64. The Chamber has considered the evidence of those witnesses who testified about public meetings[104] and is of the view that there is sufficient evidence which, if believed, could sustain a conviction of the Accused for his responsibility under Article 6(1) for direct and public incitement to commit genocide.

Count 4: Crime Against Humanity – Rape

65. Count 4 of the Indictment charges the Accused with rape as a crime against humanity as defined in Article 3(g) of the Statute. The Prosecution relies on paragraphs 3.41 and

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[100] *Ibid.*, para. 556.
[101] *Ibid.*, para. 560.
[102] Ibid., para. 562.
[103] Witness CCR testified that he attended a security meeting at the Nyakizu *communal* office (T. 20 May 2005, p. 7) where the Accused stated that the accomplices of the *Inyenzi* were the "Tutsis and the Hutus who are cowards" and, "All these persons must be exterminated. We must get rid of this dirt." (T. 20 May 2005, p. 12). The Accused also stated that weapons would be distributed after the meeting. (T. 20 May 2005, p. 12). Witness YAI testified that he attended a meeting at the end of May 1994 at the Gikore trade centre, Nyaruhengeri *commune*, which was attended by persons from Gikore, from Nyaruhengeri *commune* and other neighbouring *secteurs*, from *secteurs* in Kegembe *commune*, from Kibayi *commune*, and from Muganza *commune*. (T. 25 May 2005, p. 6). At this meeting, the Accused spoke about Hutu men who had taken Tutsi wives, and told them to "Send these women back to their homes", a statement that Witness YAI took to mean that the Tutsi women should be delivered to their killers, because these Tutsi women had come from Gikore, near the Burundian border, and their homes had been destroyed so they could not literally be sent back. (T. 25 May 2005, pp. 8-9). Witness CCP also testified regarding the Gikore meeting. Witness CCP testified that the meeting took place in late May or early June 1994 and that the Accused stated that Hutu men who had married Tutsi girls should kill them or, if they could not do so, then they should send them away. CCP added that the Accused had used a Rwandan proverb saying that these girls should die elsewhere because they could poison their husbands. (T. 9 June 2005, p. 6). According to CCP, the Accused also likened the Tutsis to snakes who must be killed and whose eggs must be crushed. (T. 9 June 2005, pp. 6-7). In addition, the testimony of YAQ on the Accused's statements of 24 April 1994 regarding the killing of Tutsis (T. 31 May 2005, p. 6), is also relevant to this Count. See also, footnote 95, *supra*..
[104] See the testimonies of Witnesses CCR, YAI, CCP, and YAQ.

3.41(i) of the Indictment to establish the liability of the Accused as a superior under Article 6(1) and 6(3) of the Statute.

66. The Chamber recalls the definition of rape given in the *Kurnarać* Judgement and adopted by the ICTR and the ICTY in their respective jurisprudence:

> [...] the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. [105]

67. The Prosecution relies on the testimonies of Witnesses TM, QY and AFV, as direct victims, to prove this charge of rape.[106] These testimonies show that Tutsi girls and women were raped by members of the armed forces under the control of the Accused, and

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[105] *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 ; *Théoneste Bagosora et al.*, case No ICTR-98-41-T, Decision on motions for judgement of acquittal (TC), 2 February 2005, par. 30.

[106] Prosecution Witness QY testified that she was raped by a soldier in the woods when she arrived at the EER. The soldier was wearing military gear, a black beret and a gun; she does not know which camp the soldier came from, but she believes he was from the ESO (T. 8 June 2005, p. 19; T. 13 June 2005, p. 18, 27 (in closed session), T. 14 June 2005, p. 19 (in closed session)). QY testified that she was raped again by three soldiers, whose names she does not know and who took her to *Rwabayanga* (T. 8 June 2005, p. 20; T. 14 June 2005, p. 19, 20 (in closed session)). Two weeks after that event, Witness QY was raped by another soldier, whose name she does not know and whom she would not be able to recognise, who took her to the back of the courtyard of the *Préfecture* Office, to a small house (T. 8 June 2005, p. 21, 22; T. 14 June 2005, p. 19 & 20 (in closed session)). Later, a person dressed in civilian clothes took Witness QY to a place known as *Chez Mahenga* where soldiers were present (T. 8 June 2005, p. 23). They had forcibly married Tutsi girls around the age of the witness (T. 14 June 2005, p. 21 (in closed session)). While at this place Witness QY became a sort of wife to this person who had brought her there. He raped her on many occasions (T. 14 June 2005, p. 21 (in closed session)). Prosecution Witness AFV testified that soldiers she encountered at a roadblock took her to the wood, undressed her, took off her underpants while she was sitting, tied her with her sweater, and blindfolded her with her other clothing (T. 21 June 2005, p. 16). Witness AFV testified that she was lying on her back and one of the soldiers removed his trousers, and as he approached her she said "do not touch me. It is better for you to kill me", and then her head was slammed against the ground and she lost consciousness (T. 21 June 2005, p. 16). When she regained consciousness, AFV's attackers had left, and she had lost a lot of blood from her sexual organ (T. 21 June 2005, p. 16). The bleeding continued after AFV got home and she also noticed a white liquid or substance near her pubic area. AFV testified that she believed the bleeding from her sexual organs and white substance around her pubic area were the result of having been raped by the two soldiers (T. 21 June 2005, p. 17). Prosecution Witness TM testified that persons attacked her house, including two soldiers called Katabirora and Sebuhoro as well as persons named Ndayisaba, Ntawuhiganayo and one Isidore, and that the attackers raped her in her house (T. 22 June 2005, p. 3, 4). Katabirora was the first to rape TM. When she attempted to resist, Katabirora hit her. TM also saw Ntawuhiganayo raping her (T. 22 June 2005, p. 4, 5). Regarding Muvunyi's status as a superior under Article 6(3), *see* footnote 95 *supra*.

by civilians, in the context of "a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[107]

68. The Trial chamber in *Akayesu* interpreted Article 3 of the Statute as requiring that the following elements be established before entering a conviction for crimes against humanity:

    i The act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
    ii The act must be committed as part of a widespread or systematic attack;
    iii The act must be committed against members of the civilian population.[108]

69. The *Akayesu* Appeals Chamber explained the mental element under Article 3 is that the Accused "knew that his act could further a discriminatory attack against a civilian population."[109]

70. Having considered these witnesses' testimonies, the Chamber concludes that there is sufficient evidence which, if believed, could sustain a conviction of the Accused for his responsibility under Article 6(3) on the count of rape as a crime against humanity. However, the Chamber has not found any evidence to support the allegation of Muvunyi's responsibility under Article 6(1).

Count 5: Crime Against Humanity – Other Inhumane Acts

71. Count 5 of the Indictment charges the Accused with other inhumane acts as a crime against humanity as defined in Article 3(i) of the Statute. The Prosecutor relies on paragraphs 3.44 and 3.47 to establish Muvunyi's liability pursuant to Article 6(3) of the Statute.[110] The Chamber recalls the Defence argument that no evidence was adduced in support of this count whereas the Prosecution asserts that there is evidence to show that witnesses were subjected to repeated beatings, floggings, and were subjected to cruel and degrading punishment.

72. The Chamber recalls the elements of crimes against humanity discussed under Count 4. The Chamber notes that other inhumane acts include those crimes against humanity that are not specified in Article 3 of the Statute, but are of comparable seriousness. The Chamber recalls the elements of inhumane acts as stated in the *Kayishema* Judgement:

> "for an accused to be found guilty of crimes against humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act, and with knowledge that the act is perpetrated within the overall context of the attack."[111]

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[107] Article 3 of the Statute.
[108] *Akayesu* Trial Judgement, para. 578.
[109] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, 23 November 2001, Appeals Judgement, para. 467.
[110] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, "The Prosecutor's Notice of the Filing of a Schedule of Particulars to the Indictment Pursuant to the Directive of the Trial Chamber", 28 February 2005, para. 35.
[111] *Prosecutor v Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, 25 May 1999, para.154.

73. The Prosecution offers the testimonies of Witnesses YAO[112] and YAN[113] in support of this count. Their testimonies support paragraph 3.47 of the Indictment. The Chamber has considered their testimonies and finds that, if believed, they could sustain a conviction of the Accused for other inhumane acts pursuant to Article 6(3).[114]

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES the Motion as to Count 1: Genocide;

DENIES the Motion as to Count 2: Complicity in Genocide;

DENIES the Motion as to Count 3: Direct and Public Incitement to Commit Genocide;

DENIES the Motion as to Count 4: Crime Against Humanity – Rape;

DENIES the Motion as to Count 5: Crime Against Humanity – Other Inhumane Acts.

Arusha, 13 October 2005

Asoka de Silva Presiding Judge	Flavia Lattanzi Judge	Florence Rita Arrey Judge

[Seal of the Tribunal]

[112] Witness YAO testified that she was arrested in Butare Cathedral and ordered by ESO Chief Warrant Officer Gakwerere to roll in the mud as a group of soldiers hit her calling her *Inyenzi*. (T. 21 March 2005, p. 10). YAO also testified that she was taken in the soldiers' vehicle to the Butare Bishop's house, where a man was arrested. (T. 21 March 2005, p. 12.) The soldiers beat this man with their guns and kicked him with their boots. (T. 21 March 2005, p. 13).

[113] Witness YAN testified that after his arrest, soldiers kicked him, put him in a pick-up and took him to the ESO. Witness YAN testified that this white single-cabin pick-up belonged to the Nyiramasuhuko family. (T. 30 May 2005, p.4). Witness YAN was also wounded with a bayonet and he still bears the scar of that wound. (T. 30 May 2005, p. 5).

[114] The Chamber notes that there was no evidence adduced in support of the Prosecution's allegation in paragraph 3.44 of the Indictment that soldiers guarding a roadblock in front of ESO prevented the *Conseiller* from taking a group of 62 children between the ages of 16 months and 5 years to the Butare University Hospital for Medical treatment.