UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr. Adama Dieng

Date: 18 June 2007

The PROSECUTOR
v.
Augustin NDINDILIYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-00-56-T

CORRIGENDUM TO THE DECISION ON DEFENCE MOTIONS PURSUANT TO RULE 98*BIS*

Office of the Prosecutor:
Mr Ciré Aly Bâ
Mr Moussa Sefon
Mr Segun Jegede
Mr. Lloyd Strickland
Mr Abubacarr Tambadou
Ms Felistas Mushi
Ms Faria Rekkas
Ms Anne Pauline Bodley

Counsel for the Defence:
Mr Gilles St-Laurent and Mr Ronnie MacDonald **for Augustin Bizimungu**
Mr Christopher Black and Mr Patrick De Wolf **for Augustin Ndindiliyimana**
Mr Charles Taku **for François-Xavier Nzuwonemeye**
Mr Fabien Segatwa and Mr Seydou Doumbia **for Innocent Sagahutu**

INTRODUCTION

1. By an amended Indictment dated 23 August 2004, the Prosecutor charged the four accused persons with conspiracy to commit genocide (Count 1); murder as a crime against humanity (Count 4); and murder as a violation of Article 3 common to the Geneva Conventions (Count 7). Bizimungu and Ndindiliyimana are also charged with genocide (Count 2), or in the alternative complicity in genocide (Count 3), and with extermination as a crime against humanity (Count 5). Bizimungu, Nzuwonemeye and Sagahutu are further charged with rape as a crime against humanity (Count 6), and with rape, humiliating and degrading treatment as war crimes under Article 3 common to the Geneva Conventions and Additional Protocol II (Count 8).

2. The trial commenced on 24 September 2004. On 7 December 2006, the Prosecution closed its case against the four Accused after presenting seventy-one factual witnesses plus one expert witness, and entering 120 exhibits. On the same day, the Chamber held a Status Conference during which it ordered the Defence teams to file any Motions pursuant to Rule 98*bis* by 15 January 2007 and the Prosecution its Response by 31 January 2007.

3. The Defence for Bizimungu, the Defence for Ndindiliyimana and the Defence for Nzuwonemeye filed their respective Motions on 15 January 2007.[1] The Prosecution responded to the three Motions on 29 January 2007.[2] The Defence for Ndindiliyimana and the Defence for Nzuwonemeye filed Replies on 2 February 2007;[3] the Defence for Bizimungu, after an extension was granted by the Chamber, filed its Reply on 9 February 2007.[4] The Prosecution filed a Rejoinder to the Replies of Bizimungu and Ndindiliyimana.[5] The Defence for Ndindiliyimana subsequently filed a Surrejoinder.[6]

4. On 13 February 2007, Nzuwonemeye filed a Corrigendum to his Reply. The Chamber notes that the Corrigendum filed is a more structured document, corrects several typographical errors, and does not make any substantive change to the Reply as originally filed. The Chamber therefore accepts Nzuwonemeye's amended Reply.

---

[1] *The Prosecutor v. A. Bizimungu et al*, "*Requête en Acquittment de la Défense D'Augustin Bizimungu*", 15 January 2007; "Ndindiliyimana's Motion Pursuant to Rule 98*bis* of the Rules", 15 January 2007; "Nzuwonemeye's Motion for Acquittal Pursuant to Rule 98bis", 15 January 2007.

[2] *The Prosecutor v. A. Bizimungu et al*, "Prosecutor's Response to '*Requête en Acquittement de la Défense D'Augustin Bizimungu*', 29 January 2007; "*Réponse du Procureur a la requête aux fins d'acquittement présentée par Augustin Ndindiliyimana sur le fondement de l'article 98bis du Règlement de procédure et de preuve*", 29 January 2007; "Prosecutor's Response to Nzuwonemeye's Motion for Acquittal Pursuant to Rule 98*bis*", 29 January 2007.

[3] *The Prosecutor v. A. Bizimungu et al*, "Response to Prosecutor's Reply to 98*bis* Motion Made By the Applicant, Augustin Ndindiliyimana", 2 February 2007; "Nzuwonemeye's Reply to the Prosecutor's Response to Nzuwonemeye's Motion for Acquittal Pursuant to Rule 98*bis*", 2 February 2007; "Corrigendum to Nzuwonemeye's Reply to the Prosecutor's Response to Nzuwonemeye's Motion for Acquittal Pursuant to Rule 98*bis*", 12 February 2007.

[4] *The Prosecutor v. A. Bizimungu et al*, "*Réplique a la Réponse du Procureur a la Requête en acquittement de la Défense d'Augustin Bizimungu*", 9 February 2007.

[5] *The Prosecutor v. A. Bizimungu et al*, "Prosecutor's Rejoinder to '*Réplique a la Réponse du Procureur a la Requête en acquittement de la Défense d'Augustin Bizimungu' "*, 12 February 2007; "*Réponse du Procureur a la réplique présentée par le conseil d'Augustin Ndindiliyimana le 2 février 2007* (*Requête en acquittement: article 98bis du Règlement de procédure et du preuve*) *"*, 5 February 2007.

[6] *The Prosecutor v. A. Bizimungu et al*, "Counter-Response To Prosecutor's Second Reply To 98*bis* Motion of Applicant Ndindiliyimana, 12 February 2007; "Corrigendum to Nzuwonemeye's Reply to the Prosecutor's Response to Nzuwonemeye's Motion for Acquittal Pursuant to Rule 98*bis*", 12 February 2007.

DELIBERATIONS

A. General Principles under Rule 98*bis*

5. 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.

*i) Scope of the Chamber's Enquiry under Rule 98*bis

6. The clearly established legal standard which the Prosecution must meet to withstand a motion for judgement of acquittal under Rule 98*bis* of the Rules is that there must be sufficient evidence upon which a reasonable trier of fact *could*, if the evidence is believed, find the Accused guilty of the crime charged.[7] The test to be applied is whether "the evidence, assuming it is true, could not possibly sustain a finding of guilt beyond 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."[8] In effect, when considering a motion for acquittal, the relevant question is not whether the Trial Chamber *would* in fact enter a conviction beyond reasonable doubt on the basis of the Prosecution evidence, but whether it *could*. A finding that sufficient evidence has been led to deny a Rule 98*bis* motion in respect of a particular count in the Indictment, does not preclude the Chamber at the end of the case from entering a judgement of acquittal on the same count, where it comes to the conclusion that the Prosecution has failed to make out the count beyond all reasonable doubt.[9]

7. As stated in *Prosecutor v. Enver Hadzihasanovic and Amir Kabura*: "A dismissal of a request for acquittal merely shows that the Chamber considers that there is in the case *some prosecution evidence* which, taken at its highest, could satisfy *a* Trial Chamber *i.e.* is capable of persuading *a* Trial Chamber of the guilt of the Accused of the charge being considered."[10] It follows that a decision pursuant to Rule 98*bis* does not require the Chamber to evaluate the credibility and reliability of the Prosecution evidence; that comes at the end of the trial taking into account the evidence as a whole. However, where the Prosecution's case has completely broken down either on its own presentation, or as a result of defence cross-examination, with the effect that the Prosecution is left without a case, the Chamber may consider that the evidence obviously lacks credibility and reliability, and therefore enter a judgement of acquittal.[11]

---

[7] *The Prosecutor v. Zigiranyirazo*, "Decision on the Defence Motion pursuant to Rule 98*bis*", 21 February 2007, para. 8; *The Prosecutor v. Rwamakuba*, "Decision on Defence Motion for Judgement of Acquittal", 28 October 2005 (*Rwamakuba* 98*bis* Decision), para. 5; *The Prosecutor v. Mpambara*, "Decision on the Defence's Motion for Judgement of Acquittal", 21 October 2005 (*Mpambara* 98*bis* Decision), para. 4; *The Prosecutor v. Muvunyi*, "Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis*", 13 October 2005 (*Muvunyi* 98*bis* Decision), para. 36; *The Prosecutor v. Bagosora et al*, "Decision on Motions for Judgement of Acquittal", 2 February 2005 (*Bagosora* 98*bis* Decision), para. 6; *The Prosecutor v. Nyiramasuhuko et al*, "Decision on Defence Motions for Acquittal under Rule 98bis", 16 December 2004 (*Butare* 98*bis* Decision), para. 71.

[8] *Bagosora* 98bis Decision, paras. 6-8.

[9] *The Prosecutor v. Jelisic Judgement* (AC), 5 July 2001, para. 37 (*Jelisic* Judgement (AC)).

[10] *The Prosecutor v. Hadzihasanovic & Amir Kabura*, "Decision on Motions for Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence" (TC), 27 September 2004, para. 17.

[11] *Muvunyi* 98*bis* Decision, para 37; *Rwamakuba* 98*bis* Decision, para. 7; *Butare* 98*bis* Decision, para. 71; *The Prosecutor v. Kamuhanda* , "Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence" (TC), 20 August 2002, para. 19 (*Kamuhanda* 98bis Decision); *The*

8. The Chamber will also not consider whether the Defence has had sufficient notice of charges to sustain a conviction, or whether there are other legal defects in the Indictment which could lead to acquittal.[12] The examination of whether there was clear and consistent notice adequate to cure any such defect is not appropriate at this stage of the proceedings, nor is the Chamber legally authorized by Rule 98*bis* to consider these matters.[13]

(ii) Sufficiency of Evidence in Relation to Particular Paragraphs of the Indictment

9. All three Defence teams submit that the evidence should be assessed not only in relation to entire counts in the Indictment but also in relation to facts specified in individual paragraphs, which are not supported by sufficient evidence. In this respect the Chamber recalls that the plain language of 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*".[14] As stated in the *Bagosora* Decision, a paragraph by paragraph analysis of the Defence motions would draw the Chamber into an "unwarranted substantive evaluation of the quality of much of the Prosecution evidence", an exercise which is neither necessary nor appropriate when considering a Rule 98*bis* Motion.[15]

10. The Chamber therefore considers it appropriate to examine the evidence in relation to counts, without having to test the sufficiency of the evidence in respect of particular paragraphs of the Indictment.[16] The Chamber will only depart from this principle where the Prosecution announces its intention to withdraw particular paragraphs of the Indictment due to lack of evidence. Where that is the case, the Chamber finds that the Defence is not required to answer to the allegations in the relevant paragraphs.

11. The Chamber takes note of the Prosecution request to withdraw paragraphs 71, 72, 92, 94, 95, 97 and 98 of the amended Indictment with respect to the Accused Ndindiliyimana on the basis that it has not led any evidence on these paragraphs. The Chamber takes further note of the Prosecution's concession that it has offered no evidence on paragraph 79 which supports the charge of murder as a violation of Article 3 common to the Geneva Conventions pursuant to Article 6(1) of the Statute with respect to the Accused Bizimungu. The Chamber accepts the Prosecution submission that no evidence has been led on these paragraphs and, accordingly, finds that the Accused Ndindiliyimana has no case to answer with respect to the allegations contained in paragraphs 71, 72, 92, 94, 95, 97 and 98 and the Accused Bizimungu has no case to answer with respect to the allegation contained in paragraph 79 of the amended Indictment.

Prosecutor v. Kordic and Cerkez, "Decision on Defence Motions for Judgement of Acquittal (TC), 6 April 2000", para. 28.

[12] *Bagosora* 98*bis* Decision, para. 7, citing *Butare* 98bis Decision, paras. 73-75; *The Prosecutor v. Semanza*, Decision on the Defence Motion for a Judgement of Acquittal (TC), 27 September 2001, (Semanza 98bis Decision) para. 18; *The Prosecutor v. Kunarac et al.*, Decision on Motion for Acquittal (TC), 3 July 2000, para. 27.

[13] *Semanza* 98*bis* Decision, para 18.

[14] Rule 98*bis* of the Rules of Procedure and Evidence.

[15] *Bagosora* 98*bis* Decision, paras. 8-9.

[16] *See Muvunyi* 98*bis* Decision, para. 39; *Bagosora* 98*bis* Decision, para. 8.

B. Sufficiency of Evidence in Relation to the Counts of the Indictment

12. In the following section, the Chamber will examine the sufficiency of the evidence in relation to each count in the Indictment, in light of the legal standard under Rule 98*bis* of the Rules as explained above.

Count 1: Conspiracy to Commit Genocide

13. All three moving parties seek acquittal on the count of conspiracy to commit genocide. The Indictment alleges that the Accused and other named individuals decided and executed a common scheme to destroy in whole or in part the Tutsi ethnic group of Rwanda. It is further alleged that through "their acts or obstinate refusal to mobilize the *Forces armées rwandaises* to fulfill their legal mandate to maintain and safeguard public peace," the Accused conspired together and with others to commit genocide against the Tutsi.

14. Conspiracy to commit genocide is punishable under Article 2(3)(b) of the Statute. Conspiracy represents the agreement of two or more persons to pursue a common criminal objective.[17] The *actus reus* of conspiracy to commit genocide is that an agreement has been reached that has, as its common object, the commission of genocide against a protected group; the *mens rea* is the intent to enter into such an agreement. A conspiracy to commit genocide cannot exist unless all the perpetrators share the specific intent of the crime of genocide.[18] This intent may be proved either expressly by the words of the perpetrator or by reasonable deduction from his or her conduct.[19] It is unnecessary to show that the criminal object of a conspiracy has in fact materialized; as an inchoate offence, conspiracy exists upon proof of the agreement itself.[20] However, conspiracy cannot be committed by omission.[21] Circumstantial evidence may be relied upon to prove the existence of the agreement, for example, where evidence of coordinated action by the Accused persons or the institutions they control, in pursuit of the unlawful act, supports the inference of an agreement to commit genocide.[22]

15. Although the Tribunal's temporal jurisdiction is limited to crimes committed during 1994,[23] conspiracy is a crime of a continuing nature. For this reason, evidence of acts that occurred prior to 1994 may be relied upon as evidence of a conspiracy that culminated in genocide committed during the period between 1 January 1994 and 31 December 1994.[24]

16. The Defence teams for Bizimungu, Ndindiliyimana and Nzuwonemeye argue that there is no evidence of a formal agreement between the Accused and other persons named in

---

[17] *Bagosora* 98*bis* Decision, para. 12, referring to *The Prosecutor v. Musema*, Judgement (TC), 27 January 2000, para. 190 (*Musema* Judgement (TC)).
[18] *Bagosora* 98*bis* Decision,.para. 12, referring to *Musema* Judgement, para. 192: "[W]ith 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". See also *Niyitegeka*, Judgement (TC), 16 May 2003, para. 423 (*Niyitegeka* Judgement (TC)).
[19] *Bagosora* 98*bis* Decision, para. 12, referring to *The Prosecutor v. Ndindabahizi*, Judgement (TC), 15 July 2004, para. 454 *(Ndindabahizi* Judgement (TC))
[20] *The Prosecutor v. Nahimana et al.* (TC), Judgement, 3 December 2003, para. 1044 (*Nahimana* Judgement (TC)).
[21] *The Prosecutor v. C. Bizimungu et al* , "Decision on Defence Motions Pursuant to Rule 98bis" 22 November 2005, (*Bizimunugu* et al 98*bis* Decision), para 23.
[22] *Niyitegeka* Judgement (TC), paras. 427-428, as cited in *Nahimana* Judgement, para. 1046: "… conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity as well as or even independently of their links with each other."
[23] Article 1 of the Statute.
[24] *Nahimana* Judgement (TC), para. 1044.

the Indictment. Furthermore, the Defence for Ndindiliyimana emphatically opposes the notion that a conspiracy can be established by inference from subsequent actions of individuals presumed to be part of the conspiracy.

17. The Defence for Bizimungu and Nzuwonemeye both concede that an agreement could be inferred from a variety of circumstances, but submit that no evidence has been led to justify such an inference in this case. The Prosecution submits that an agreement can be inferred from concerted or coordinated action on the part of individuals or the institutions over which they exercise control.

18. The Chamber notes that the evidence led by the Prosecution does not seem to establish the existence of a formal or express agreement between the Accused persons. However, the Chamber has heard the following evidence which it will assess in order to determine whether if believed, it could support an inference that an agreement was concluded between the Accused persons and others named in the Indictment to commit genocide against the Tutsi:

- The official position of the Accused Bizimungu, Ndindiliyimana and Nzuwonemeye as Chief of Staff of the Rwandan Army, Chief of Staff of the *Gendarmerie Nationale*, and Commander of the Reconnaissance ("Recce") Battalion respectively, and the fact that the institutions under their command and control engaged in various activities that facilitated the mass killing of Tutsis on account of their ethnic identification;[25]
- In 1991, following the invasion of Rwanda by rebels of the Rwandan Patriotic Front (RPF) the previous year, the government of President Habyarimana commissioned a report which defined the 'enemy' as the Tutsi. This definition was widely disseminated among elements of the Rwandan Armed Forces with a view to their indoctrination;[26]
- From as early as 1991, the government of Rwanda elaborated an ethnically-oriented civil defence programme, the main components of which included training civilian Hutu men in military tactics and weapons handling; the provision of firearms and ammunition to trained militia; and the preparation of lists of Tutsi to be eliminated;[27]
- In his capacity as Operational Sector Commander in Ruhengeri *prefectur*e between 1992 and 1994, Bizimungu facilitated and supervised the training of

[25] See the evidence of Witness Romeo Dallaire T 20 November 2006, pp. 52, 56; T. 21 November 2006, pp. 12 -13, 20; AOG/006, T. 21 February 2006, p. 24; T. 22 February pp. 30-31; FAV, T. 21 September 2004, p. 17; KJ, T. 21 March 2006, pp. 31,32; Witness ANC, T. 29 May 2006, p. 43.

[26] Witness LN, T. 12 September 2005, pp. 45; T. 13 September 2005, pp82-83; DP, T. 22 September 2005, p. 64 where the witness says that in 1992, a telegram in French was received at Camp Kanombe from Army Headquarters and read to himself and other soldiers. He said the telegram defined the enemy as the Tutsi inside or outside the country; Expert Witness Des Forges, T. 19 September 2006, pp. 55-62.

[27] Witnesses AOG/006, T. 20 February 2006, pp. 39, 42; T. 21 February 2006, pp. 17, 18, 22; Franck Claeys, T. 11 October 2005, pp. 28, 29; DY, T. 23 January 2006, p. 28, 29; GFA, T. 30 January 2006, pp. 71, 72, 74, 76 77, 78, 79; OX, T. 14 June 2006, pp. 65, 66; GFD, T. May 2005, pp. 63, 64, 65; T. 19 May 2005, p. 12; GFV, T. 23 May 2005, pp. 14, 15; Alison Des Forges, T. 20 September 2006, pp. 26, 27, 28, 33, 34. At page 33, Expert Witness Des Forges notes that there was an assumption that the civilian self-defence plan would function in areas not yet touched by the war, that it would be directed against an enemy that could be damaged by the use of weapons that were not firearms, together with the prevailing attitude that the enemy could be defined as someone other than a combatant soldier, all of which shifted civilian self-defence against the military force into a programme which led to the use of armed force against unarmed civilians in violations of the laws of war, particularly civilians defined by their ethnicity and therefore, the realisation of a genocide.

civilian militia in weapons handling and provided weapons to them upon completion of training. The evidence suggests that the militia were being trained in preparation for the mass killing of Tutsi civilians and some of the weapons distributed were in fact later used to kill thousands of Tutsi civilians;[28]

- The Accused Bizimungu participated in various meetings between 1991 and 1994 to discuss the identity of the enemy and how to combat it. These meetings identified the Tutsi as the 'enemy', and equated members of that ethnic group to the *Igusura* plant that needed to be eliminated;[29]
- Bizimungu told members of the Hutu population at several meetings including one held on 6 April 1994 at Nzirorera's mother's house, that Tutsi were responsible for killing the President and that no Tutsi should be spared. These meetings were also attended by other senior Hutu political and military figures including Joseph Nzirorera, Ephrem Setako, and Juvenal Kajelijeli; [30]
- Bizimungu and Ndindiliyimana made remarks after 6 April 1994 which arguably could be interpreted as threats or exhortations to kill Tutsi civilians;[31]
- At some point between April and June 1994, Ndindiliyimana issued a general circular from the *gendamerie* Headquarters to *gendamerie* units throughout the country asking them to collaborate with the civilians "to fight against the enemy", and also asked that civilians with written attestations from him should be allowed to collect weapons and other materials from the *gendamerie* camps;[32]
- On at least one occasion, Ndindiliyimana gave orders for a senior *gendamerie* officer, who was opposed to the killing of Tutsi, to be transferred from Kibuye to the war front in Kigali;[33]
- Ndindiliyimana gave information to Mathieu Ngirumpatse, Chairman of the MRND political Party, about imminent weapons searches by soldiers of UNAMIR and thereby frustrated efforts to enforce the Kigali Weapons Secure Area (KWSA);[34]
- Ndindiliyimana and Nzuwonemeye both attended the meeting held at the Army Headquarters in Kigali on the night of 6 April 1994 soon after the President of the country was killed in a plane crash. At another meeting held at the *Ecole Supérieure Militaire* (ESM) the following day, they established a Crisis Committee composed of senior military figures under the chairmanship of

[28] Witnesses GFA, T. 30 January 2006, pp. 71, 76, 77; GAP, T. 15 February 2006, p. 25, 26, 27; GFD, T. 10 May 2005, pp. 63, 64, 65; T. 19 May 2005, p. 12; GFV, T. 23 May 2005, pp. 14, 15, 16; AOF, T. 16 March 2006, pp. 17, 19, 20, 21.
[29] Witnesses GFA, T. 30 January 2006, pp. 61, 62, 65, 66, 67; GAP, T. 15 February 2005, pp. 22, 23, 24, 25, 33, 34, 35; AOF, T. 16 March 2006, p. 28 (ICS).
[30] Witness GAP, T. 15 February 2005, pp. 33, 34, 35, 36 where Bizimungu declared that "if the RPF resumed hostilities, no Tutsi would survive;" Witness GFA, T. 30 January 2006, pp. 61, 62, 65, 66, 67.
[31] Witness ANC, T. 29 May 2006, pp 50,52,57,59, 60; Witness GAP, T. 15 February 2005, pp. 33, 36.
[32] Witness KJ, T. 21 March 2006, pp.31- 32.
[33] Witness KJ, T. 21 March 2006, pp 17, 18, 24.
[34] Witness AOG/006, T. 21 February 2006, pp. 24, 25; Witness Dallaire, T. 20 November 2006, p. 48: "there was a sense that the gendarmerie was infiltrated by hardliners who were tipping off the people storing the weapons which was why no weapons were ever found."

Ndindiliyimana; the Committee was responsible for the formation of a new interim civilian administration dominated by Hutu;[35]

- Soon after the President's death in early April 1994, several opposition politicians and moderate Hutus were assassinated by members of the Rwandan Armed forces, including the Presidential Guard and Recce Battalion;[36]
- In an effort to frustrate and ultimately defeat UNAMIR's weapons searches in implementation of the Kigali Weapons Secure Area, Nzuwonemeye organized the concealment of weapons, including armored vehicles, from the facilities of the Recce Battalion to one of President Habyarimana's residences in Gisenyi. These weapons were soon to be deployed on 6 April 1994 after the President's death;[37]
- Following his attendance at the meeting of senior military officers on the night of 6-7 April 1994, Nzuwonemeye issued instructions for the deployment of troops and armored vehicles to blockade Prime Minister Agathe's residence as a result of which the Prime Minister was subsequently killed. The Prime Minister was a representative of the opposition MDR Party in the Broad Based Transitional Government established under the Arusha Accords;[38]
- The troops deployed by Nzuwonemeye from the Recce Battalion to the Prime Minister's residence, disarmed and arrested ten UNAMIR soldiers of the Belgian contingent who were subsequently taken to Camp Kigali and killed.[39]

The Chamber concludes that if believed, the above evidence could lead to an inference that the Accused persons and others entered into a conspiracy to commit genocide at some point during the period alleged in the Indictment.

Count 2: Genocide

19. The Accused Ndindiliyimana requests acquittal on count 2 of the Indictment, charging genocide, pursuant to Article 2(3)(a) of the Statute both under Article 6(1) and 6(3) of the Statute. Genocide is defined as:

> [a]ny 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.

[35] Witnesses Dallaire, T. 20 November 2006, p. 56; T. 21 November 2006, pp. 18-20; Witness ALN, T. 29 September 2004, pp. 42, 43; Witness AWC, T. 18 January 2006, pp. 29, 30.
[36] Witnesses BB, T. 15 June 2006, pp. 30, 31, 44, 46; ANL/CJ, T. 28 June 2006, pp. 20, 21, 22, 23; LN, T. 12 September 2005, pp. 55, 60, 61; Florida Mukeshimana, 6 September 2006, pp. 33, 34, 35, 39; Madame Kavaruganda, T. 14 November 2006, p. 54.
[37] Witnesses DA, T. 11 January 2005, pp. 40, 41, 42 and 18 January 2005, pp. 52-53; DY, T. 23 January 2006, pp. 37, 38.
[38] Witnesses DA, T. 11 January 2005, pp 39, 40; LN, T. 12 September 2005, p. 70; ALN, T. 29 September 2004, p. 45, 47 and T. 30 September 2004, p. 37; DP, T 22 September 2005, pp. 68, 73; AWC, T. 18 January 2006, pp. 31, 32; DY, T. 23 January 2006, pp. 42, 46, 53.
[39] Witnesses ALN, T. 30 September 2004, pp. 26-28 and T. 5 October 2004, p. 35; AWC, T. 18 January 2006, pp. 33, 34, 35; DY, T 23 January 2006, pp. 39, 40, 41.

20. Articles 6(1) and 6(3) of the Statute set forth the forms of participation to be considered by the Chamber in its assessment of the sufficiency of evidence in relation to the counts charged against the Accused.

21. Article 6(1) of the Statute imposes individual criminal responsibility upon 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." Article 6(3) provides that where an act was committed by a subordinate, the superior is not relieved of liability, if the superior 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.

22. To establish an individual's liability for genocide, it is necessary to adduce evidence not only of the commission of one or more of the material acts enumerated in Article 2(2) of the Statute, but also evidence proving an individual's specific intent to commit genocide. To prove specific intent the Prosecution must establish "that the perpetrator target[ed] his victims because of their membership in a protected group, with the intent to destroy at least a substantial part of that group."[40] The Accused's intent to commit genocide may be derived from direct evidence such as his spoken words, or deduced from a variety of facts and circumstances, including his conduct.[41]

23. The Defence for Ndindiliyimana submits that the allegations concerning massacres under the supervision of *gendarmes* cannot be attributed to him because the Prosecution failed to demonstrate that the Accused had effective control over the said *gendarmes* and civilian militia. The Defence further submits that the Prosecution failed to show that Ndindiliyimana knew or had reason to know of the alleged criminal acts of the *gendarmes*. The Defence argues that despite his formal designation as Chief of Staff of the *gendamerie*, the Accused did not have any real power or resources to make operational decisions, or otherwise exercise disciplinary control over errant *gendamerie* men and civilian militia. The Prosecution disputes that there is insufficient evidence to support the genocide charge against Ndindiliyimana.

24. There is evidence that Ndindiliyimana, on specific events after 6 April 1994, ordered or instigated members of the *gendarmerie* and militia to kill civilians.[42] In addition, there is evidence that Ndindiliyimana transferred a certain *gendamerie* major from Kibuye to the war front in Kigali as punishment for the latter's opposition to the killing of Tutsi civilians.[43] In his capacity as *gendamerie* Chief of Staff, Ndindiliyimana issued circulars to all *gendamerie* units in the country asking them to collaborate with the army and civilians "to fight against the enemy", and to provide weapons and other material support to civilians who presented attestations issued by the Chief of Staff. Due to his command authority over the *gendamerie*, these instructions were in fact obeyed by his subordinates.[44]

25. In addition, the Chamber has heard other evidence concerning the Accused Ndindiliyimana which could go to his alleged superior responsibility for crimes committed by his subordinates. There is evidence, *inter alia*, that *gendarmes* and militia were involved

[40] *Ndindabahizi* Judgement (TC), para. 454, citing *The Prosecutor v. Krstic*, Judgement (AC), 19 April 2004, para 12 ("The intent requirement of genocide under Article 4 of the [ICTY] statute is therefore satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group.").
[41] *C. Bizimungu et al* 98*bis* Decision, para.46; *Jelisic* Judgement (AC), para. 47.
[42] Witnesses ANC, 29 May 2006, pp. 50, 57, 58; FAV, T. 23 September 2004, pp. 51-53.
[43] Witness KJ, T. 21 March 2006, pp. 17, 18, 24.
[44] Witness KJ, T. 21 March 2006, pp. 31, 32.

in the attack on Saint André-College in Kigali on or about 13 April 1994 during which Tutsi civilians were killed.[45] There is also evidence that *gendarmes* and militia were involved in the massacres committed at Kansi Parish on or about 21 April 1994 resulting in the death of a large number of Tutsi civilians.[46] Furthermore, the Chamber has heard evidence that members of the *gendarmerie* handed-over about 40 Tutsi refugees to the militia who subsequently killed them on or about 22 April 1994.[47] In addition, there is evidence that members of the *gendarmerie* (and militiamen) were involved in the massacres committed at Murambi on 20 and 21 April 1994[48], in Nyabubare commune on or about 22 April 1994[49], at Cyanika Parish on 21 April 1994[50] and on Karama Hill at the beginning of May 1994.[51] Finally, there is evidence that on or about 21 April 1994, *gendarmes* on duty at Ndindiliyimana's house handed-over two grenades to an *Interahamwe* militiaman who used them in an attack on Tutsi the following day.[52]

26. The fact that Ndindiliyimana issued instructions to the *gendamerie* that were in fact obeyed, is sufficient indication of his authority or control over them for the purpose of deciding a Motion pursuant to Rule 98*bis*. With regard to Ndindiliyimana's criminal responsibility for the acts of the militiamen, the Chamber notes that the evidence described above concerning collaboration between the *gendamerie* and the *Interahamwe* provides a sufficient nexus at this stage of the proceedings to warrant a denial of the Motion for acquittal in respect of crimes allegedly committed by *Interahamwe* militia under the influence of Ndindiliyimana.

27. On the basis of the evidence discussed in this section and under the conspiracy count, along with all reasonable inferences arising therefrom, there is evidence which, if believed, could lead a reasonable trier of fact to conclude that the Accused Ndindiliyimana incurs responsibility for ordering and instigating genocidal killings pursuant to Article 6(1) and as a superior under Article 6(3) of the Statute.

Count 3: Complicity in Genocide

28. The Accused Ndindiliyimana requests acquittal for complicity in genocide, pursuant to Articles 2(3)(e) of the Statute. Due to lack of evidence, the Prosecution also requests that it be allowed to withdraw the complicity charge against Ndindiliyimana which is supported exclusively by the allegations in paragraphs 71 and 72. The Chamber accordingly enters a judgement of acquittal for the Accused Ndindiliyimana with respect to count 3, complicity in genocide.

Count 4: Murder as a Crime against Humanity

29. The Accused Ndindiliyimana and Nzuwonemeye request acquittal on count 4 of the Indictment, murder as a crime against humanity, pursuant to Article 2(3)(e) of the Statute. Ndindiliyimana requests acquittal under both Articles 6(1) and 6(3) of the Statute, while Nzuwonemeye requests acquittal only under Article 6(3) of the Statute with respect to

[45] Witnesses WG, T. 6 June 2005, pp. 36, 37, 38; GCB, T. 14 September 2005, p. 62, 63.
[46] Witnesses GFM, T. 19 September 2005, p.58; GFS, T. 28 September 2004 pp. 47,49.
[47] Witness ATW, T 12 June 2006, pp. 22-23, 26-29.
[48] Witnesses ANI/KEI, T. 26 January 2005, p. 22; ANG, T 30 May 2005, pp. 22, 23.
[49] Witness ANH, T 19 October 2005, pp. 49-50.
[50] Witness ANJ/KTB, T. 2 June 2005, p. 10.
[51] Witness ANF, T 13 September 2006, pp. 29, 30.
[52] Witnesses GFR, T. 29 March 2005, pp. 8, 9; Witness GFT, T. 10 January 2005, p.20.

paragraph 108 of the Amended Indictment which deals with the alleged killing of Tutsi civilians at the CHK Hospital in Kigali.

30. In order to qualify as a crime against humanity, a specific offence under Article 3 (a)-(f) of the Statute must be committed as "part of a widespread or systematic attack", directed against "any civilian population on national, political, ethnic, racial or religious grounds." "Widespread" refers to the scale of the attack and the multiplicity of victims; "systematic" reflects the organized nature of the attack, excludes acts of random violence and does not require a policy or plan.[53] The perpetrator must have knowledge 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.[54]

31. 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.[55] What distinguishes murder as a crime against humanity from genocide, is that the latter requires the killing to be perpetrated with the specific intent to destroy, in whole or in part, the group to which the victim belongs.

32. Ndindiliyimana's defence submits that either there is no evidence to support a finding that the Accused was directly responsible for the murders alleged in the Indictment, or that the evidence tendered constitutes hearsay and is unreliable. With respect to Ndindiliyimana's superior responsibility for murders allegedly committed by *gendarmes* in various parts of the country, the Defence relies on *dicta* in *Bizimungu et al.* to the effect that the Accused cannot be found guilty of murder based on allegations of generalised killings in Rwanda without sufficient evidence establishing a link between the commission of a specific killing of an identifiable individual and the Accused or one or more persons over whom he exercised control.

33. The Chamber notes that the first part of Ndindiliyimana's submission relates to the credibility or reliability of evidence, an issue which the Chamber ordinarily does not take into account when considering a motion for acquittal. With respect to the second part of the submission, there is evidence to suggest that the Accused gave orders to a group of *Interahamwe* to kill two Tutsi in Nyaruhengeri on or about 5 May 1994.[56] There is also evidence that the Accused instigated militiamen to kill a Tutsi civilian on or about 17 April 1994.[57] Furthermore, there is evidence that on specific occasions after 6 April 1994, *gendarmes* who were subordinates of Ndindiliyimana, in collaboration with *Interahamwe* militia, killed Tutsi civilians.[58]

---

[53] *Muvunyi* Judgement (TC), 12 September 2006, para. 512, (*Muvunyi* Judgement (TC)); *Ndindabahizi* Judgement (TC), 15 July 2004, para. 477.

[54] *Muvunyi* Judgment (TC), para. 514, citing *The Prosecutor v. Akayesu*, Judgement (AC), 2 September 1998, para 464-465; *Bagosora* 98*bis* Decision, para. 24.

[55] *Ndindabahizi* Judgment (TC), para. 487; *Muhimana* Judgement (TC), para. 568; *Bagosora* 98 bis Decision, para. 25.

[56] Witnesses GFT, T. 10 January 2005, pp. 28, 29; GFR, T. 29 March 2005, p. 13; FAV, T. 21 September 2004, p. 33.

[57] Witness AMW, T. 23 February 2005, pp. 22-24.

[58] Witnesses GFT, T. 10 January 2005, pp. 28, 29; GLJ, T. 15 June 2005, pp. 6, , 8, 9, 17, 20, 40, 41; FAV, T. 21 September 2004, pp. 25-26, 28-32; KF, T. 17 January 2006, pp. 25, 29, 30, 31; DA, T. 12 January 2005, pp. 14, 15, 16 and T. 25 January 2005, pp. 39, 43; ZA, T 24 May 2006, pp. 4-5; ANH, T 19 October 2005, pp. 43, 44, 45, 46,47, 49, 51-53 and GFR, T. 29 March 2005, pp. 5, 8, 9, 10, 11, 13, 15. The latter told the Chamber that he was part of a group of attackers, including gendarmes, who were guarding Ndindiliyimana's house at Nyaruhengeri, who committed "arson, murder and persecuted persons." See T. 29 March 2005, p5.

34. On the basis of the evidence discussed in this section, along with all reasonable inferences arising therefrom, the Chamber concludes that there is evidence which, if believed, could lead a reasonable Tribunal of fact to conclude that the Accused Ndindliyimana bears superior responsibility for killings committed by his subordinates as well as for ordering or instigating killings. The Chamber therefore denies Ndindiliyimana's motion for acquittal on the count of murder as a crime against humanity on the basis of both Articles 6(1) and 6(3).

35. With respect to Nzuwonemeye's request for acquittal on the charge of murder as a crime against humanity under Article 6(3) on the basis that paragraph 108 of the Indictment is not supported by the evidence, the Chamber notes that there is evidence that soldiers of the Recce Battalion were present at the residence of Prime Minister Agathe Uwilingiyimana at critically material times before and after she met her violent death, and that Recce Battalion soldiers, in collaboration with men from the Presidential Guard, were involved in disarming and subsequently killing ten members of the UNAMIR Belgian contingent.[59] In addition, the Chamber has heard evidence which suggests that soldiers of the Recce Battalion were on guard at the CHK hospital in April 1994,[60] and that Tutsi patients were abducted by soldiers from their hospital beds and never seen again.[61] Other Prosecution evidence suggests that soldiers guarding the hospital carried a list of people to be killed, and that on at least one occasion, a young Tutsi girl was taken away and killed by the soldiers.[62]

36. The above evidence, if believed, could lead a reasonable trier of fact to conclude that Nzuwonemeye bears superior responsibility for murder as charged in the Indictment. The Chamber therefore denies Nzuwonemeye's request for acquittal in respect of the count of murder as a crime against humanity pursuant to Article 6(3) of the Statute.

Count 7: Murder as a Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II

37. The Accused Bizimungu and Ndindiliyimana request acquittal on count 7 of the Indictment, murder as violations of Article 3 common to the Geneva Conventions and Additional Protocol II, pursuant to Article 4(a) of the Statute. Bizimungu requests acquittal under Article 6(1) of the Statute. Ndindiliyimana requests acquittal under both 6(1) and 6(3) of the Statute.

38. Article 4(a) prohibits "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 corporal punishment." The jurisprudence requires that three pre-conditions must be met in order to find an individual responsible for war crimes under the Statute: first, there must be a non-international armed conflict on the territory of the concerned state; second, there must be a nexus between the alleged violation and the armed conflict; and third, the victims must have been non-combatants in the sense that they were not directly taking part in the hostilities at the time of the alleged violation.[63]

39. The fact that a non-international armed conflict prevailed in Rwanda from April to June 1994 is no longer subject to dispute. Similarly, it is beyond dispute that large-scale

[59] Witnesses DY, T. 23 January 2006, pp. 39, 41, 42, 46, 53; ANK/XAF, T. 1 September 2005, pp. 7, 8, 9.
[60] Witness DCJ, T. 2 May 2006, p. 24.
[61] Witness ZA, T. 24 May 2006, pp. 19, 21, 22 (ICS).
[62] Witness DAR, T. 3 May 2006, pp. 74, 75, 76.
[63] *The Prosecutor v. Ntagerura et al*., Judgement (TC), 25 February 2004, para. 766; *The Prosecutor v. Semanza*, Judgement (TC), 15 May 2003, paras. 354-371, 512 (*Semanza* Judgement (TC)).

violations of international humanitarian law, potentially amounting to war crimes, were committed during the conflict, resulting in the death of large numbers of civilians.[64]

40. The Chamber notes that the Prosecution only relies on paragraph 66 of the Amended Indictment to support Bizimungu's responsibility for murder as a war crime pursuant to Article 6(1) of the Statute.[65] The Prosecution submits that even assuming, without conceding, that it did not lead sufficient evidence on the allegation contained in paragraph 66 of the Indictment, it is inconceivable for Bizimungu to ask for acquittal on count 7 as a whole. The Prosecution submits that there is sufficient evidence to find that Bizimungu should defend count 7 on the basis of his command responsibility.

41. The Chamber notes that Bizimungu's defence is not seeking acquittal on count 7 on the basis of command responsibility. The Chamber's consideration is therefore limited to whether sufficient evidence has been adduced which, if believed, could lead a reasonable trier of fact to find that Bizimungu bears Article 6(1) responsibility for murder as a war crime on the basis of the allegation contained in paragraph 66 of the Indictment. Having considered the evidence of Witness GFD, the only witness to testify on the issue, the Chamber finds that even if believed, this evidence would be insufficient for a reasonable trier of fact to find Bizimungu guilty beyond reasonable doubt under Article 6(1).[66] Accordingly, the Chamber enters a judgement of acquittal for Bizimungu with respect to the count of murder as violations of Article 3 common to the Geneva Conventions and Additional Protocol II under 6(1) of the Statute.

42. With respect to the count of murder as a war crime under Article 6(1) against Ndindiliyimana, the Chamber recalls that the Prosecution has led no evidence on paragraph 92. Since this is the only paragraph supporting this charge, the Chamber enters a judgement of acquittal for Ndindliyimana with respect to the charge of murder as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II under Article 6(1) of the Statute.

43. With respect to Ndindiliyimana's superior responsibility, the Chamber finds that much of the evidence discussed above in respect of murder as a crime against humanity may also be probative of the requirements of murder as violations of Article 3 common to the Geneva Conventions and Additional Protocol II. The Chamber therefore denies Ndindiliyimana's motion for acquittal on the charge of murder as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II pursuant to Article 6(3) of the Statute.

Count 5: Extermination as a Crime against Humanity

[64] *Semanza v. The Prosecutor*, Judgement (AC), 20 May 2005, para. 192 (*Semanza* Judgement (AC)); *The Prosecutor v. Karemera et al*, (AC) "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice**,** 16 June 2006", paras., 28-29.

[65] Paragraph 66 of the Amended Indictment reads: "On 16 June 1994, at a meeting held at EGENA, Augustin Bizimungu told militiamen to set up roadblocks to unmask the *Inkotanyi* who had hidden among Hutu fleeing the combat zones. As a result of these orders, a large number of Tutsi civilians and Hutu mistaken for Tutsi were killed in that area in the following hours and days."

[66] Witness GFD T. 10 May 2005, p. 67: where he testified that on 16 June 1994, Bizimungu addressed a group of wounded persons at a hospital located at EGENA *gendamerie* camp in Ruhengeri. Bizimungu told those gathered that people who had recovered should return to the battlefront and others should go and man the roadblocks. As a result of Bizimungu's remarks, Witness GFD left the hospital and proceeded on duty to a roadblock located opposite the Mukamira camp. He stayed at the roadblock until 13 July 1994 when he went into exile. Witness GFD did not say anything about killings at the said roadblock.

44. The Accused Bizimungu and Ndindiliyimana seek acquittal on count 5, extermination as a crime against humanity, pursuant to Articles 3(a) of the Statute. Bizimungu seeks acquittal pursuant to Article 6(1), and Ndindiliyimana seeks acquittal pursuant to Article 6(3) of the Statute.

45. Extermination has been defined as participation in a widespread or systematic killing or systematically subjecting a widespread number of people to conditions of living that would inevitably lead to death, with intent to cause death.[67] It is irrelevant to a charge of extermination that the accused did not kill any particular individual and that the victims were not named in an indictment. Extermination differs from murder in the sense that the *actus reus* is directed at a group or collectivity resulting in mass killing.[68]

46. The Prosecution conceded that it has not led evidence on paragraph 79, the only allegation supporting the charge of extermination as a crime against humanity under Article 6(1) of the Statute in respect of Bizimungu. The Chamber accepts the Prosecution concession and, accordingly, enters a judgement of acquittal for Bizimungu with respect to the count of extermination as a crime against humanity under 6(1) of the Statute.

47. With respect to the Ndindiliyimana, the Chamber finds that much of the evidence discussed concerning his superior responsibility for genocide above, may also be probative of the requirements of extermination as a crime against humanity. Ndindiliyimana's motion for acquittal regarding the extermination count under Article 6(3) is therefore denied.

Count 6: Rape as a Crime against Humanity

48. The Accused Bizimungu and Nzuwonemeye request a judgement of acquittal on count 6, rape as a crime against humanity, pursuant to Articles 3(g) and 6(3) of the Statute.

49. 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.[69] 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.[70]

50. Bizimungu and Nzuwonemeye are charged only with superior responsibility for rape under Article 6(3). A person is a superior not only to those over whom he is a superior

---

[67] *The Prosecutor v. Gacumbitsi* Judgement, (AC), 7 July 2006, para. 86, citing *Ntakirutimana* Judgement (AC), 13 December 2004, para. 522 (*Ntakirutimana* Judgement (AC)).
[68] *Ntakirutimana* Judgement (AC), para. 522.
[69] *The Prosecutor v. Kunarac et al.*, Judgement (TC), 10 December 1998, para. 387; *The Prosecutor v. Kunarac et al.*, Judgement (AC), 12 June 2002 para. 128 ("The Appeals Chamber concurs with the Trial Chamber's definition of rape"); *Muvunyi* Judgement (TC), para. 518-522; *Muhimana* Judgement (TC), para. 544-551; *Semanza* Judgement (TC), 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"); *The Prosecutor v. Kajelijeli* Judgement (TC), 1 December 2003, 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*"); *The Prosecutor v. Kamuhanda* Judgement (TC), 22 January 2004, para. 709.
[70] *Kunarac* Judgement (AC), 12 June 2002, para. 127; *Muvunyi* Judgement (TC), para 521: "… the underlying objective of the prohibition of rape at international law is to penalise serious violations of sexual autonomy. A violation of sexual autonomy ensues whenever a person is subjected to sexual acts of the genre listed in *Kunarac* to which he/she has not consented…"; *Semanza* Judgement (TC), paras. 344, 346; *Kajelijeli* Judgement (TC), para. 915.

in a traditional chain of military command, but also to those over whom he exercises *de facto* authority. In both instances, liability as a superior is based upon proof that the subordinates were under the effective control of the superior, in the sense of the latter's material ability to prevent or punish their criminal behaviour.[71]

51. Bizimungu's defence argues that the Prosecution failed to prove that the Accused knew or had reason to know that his subordinates were involved in, or had committed, the acts of rape alleged in the Indictment. Since *mens rea* is an essential ingredient of the crime charged, the defence argues that the Prosecution's failure to prove direct or constructive knowledge on Bizimungu's part must prove fatal to the rape charge. In the alternative, the Defence invites the Chamber to find that the Accused has no case to answer with respect to the allegation contained in paragraph 111 of the Indictment.

52. For its part, the Prosecution maintains that it has led sufficient evidence to show that rape was committed by soldiers under the command of General Bizimungu on a widespread and systematic basis at various places throughout Rwanda between 6 April and July 1994. The Prosecution relies on the evidence of DBA, DBD, LAV, QBP, TN, DEA, EZ, DBB, XY, DBE, DBH, LBC, LN, DAR, GFC, and GFV and notes that among these, twelve were victims of rape and/or inhuman and degrading treatment. The Prosecution submits that due to the widespread nature of these acts, Bizimungu knew or had reasons to know that soldiers under his command, or militia subject to his authority, had committed or were about to commit these crimes and failed to prevent the acts or to punish the perpetrators.

53. The Chamber has heard testimony from various witnesses that acts of rape were committed by members of the Rwandan Army and the *Interahamwe*.[72] The evidence adduced suggests that between April and July 1994, soldiers who were subordinates of Bizimungu systematically selected and raped Tutsi women at various places throughout the country. Some of the incidents involved multiple rapes by a group of soldiers; at other times, the soldiers acted in concert with *Interahamwe* militia. There is also evidence that RTLM radio incited the population to rape Tutsi women. According to General Dallaire, he brought the issue of RTLM broadcasts to the attention of senior military officials including General Bizimungu, but they failed to take any action.[73] This evidence, taken together with the widespread nature of the acts of rape allegedly committed throughout Rwanda, if believed, could show that Bizimungu had reason to know of their occurrence.

54. With regard to the acts of rape committed by the *Interahamwe,* the Chamber is of the view that the evidence discussed above regarding the relationship between the Army and the *Interahamwe* could, if believed, provide a sufficient nexus at this stage of the

---

[71] *The Prosecutor v. Delacic et al*. Judgement (AC), 20 February 2001, para. 196: "The showing of effective control is required in cases involving both *de jure* and *de facto* superiors"; *The Prosecutor v. Blaskic*, Judgement (AC), 29 July 2004, para. 67; *Bagosora* 98*bis* Decision, para 30.

[72] Witnesses DBD, T. 4 April 2005, pp. 69-70, 73 [rape by soldiers at a roadblock in Mukinini and at TRAFIPRO in Kabgayi]; LAV, T. 27 June 2005, pp. 5-6 [rape by soldiers at Kamarampaka Stadium and at Nyarushishi Camp]; LBC, T. 10 October 2005, pp. 11, 13 [rape by soldiers and gendarmes at Kamarampaka Stadium]; QBP, T. 5 September 2005, pp. 42, 45 [rape by soldiers of "Habyarimana's army" at EER in Butare]; TN, T. 20 September 2005, pp. 16, 17, 18 [multiple rapes by soldiers in Butare sometime after 21 April 1994]; EZ, T. 5 October 2005, pp. 14 -16 [multiple rapes by soldiers at Kabgayi] DBB, T. 26 January 2006, pp. 41, 43 [rape by soldiers at TRAFIPRO]; XY, T. 13 March 2006, pp.15, 16, 17, and T. 14 March 2006, pp. 46, 47; DBE,T. 30 March 2005, pp. 64, 65, 66 [multiple rapes by soldiers at TRAFIPRO]; DBH, T. 20 June 2005, pp. 9, 10, 14 [multiple rapes by soldiers at Musambira Communal Office]; DAR, T. 4 May 2006, pp. 3-5, 8 [rape of Tutsi girls by soldiers at CHK hospital]; DBA, T. 17 March 2005, pp. 29-31 [rape by *Interahamwe* at various times from 7 to 9 April 1994]; and pp. 35-36, [rape by soldiers on 10 April 1994].

[73] Witness Romeo Dallaire, T. 21 November 2006, p. 26.

proceedings to warrant a denial of the Motion for acquittal in respect of rapes allegedly committed by *Interahamwe* militia under the influence of Bizimungu.

55. The Chamber therefore concludes that sufficient evidence has been led which, if believed, could lead a reasonable trier of fact to find Bizimungu responsible as a superior for rape as a crime against humanity. Bizimungu's motion for acquittal on rape as a crime against humanity on the basis of Article 6(3) responsibility is therefore denied.

56. With respect to the Accused Nzuwonemeye, the Chamber notes that only paragraph 112 of the Indictment supports this charge.[74] The Defence for Nzuwonemeye submits that the Prosecution has failed to lead evidence in support of the alleged rapes at CHK hospital, or that Nzuwonemeye had command responsibility over those alleged to have committed such rapes.

57. The Chamber recalls that it has heard evidence which suggests that in April 1994, soldiers of the Recce Battalion were on guard at a roadblock located in front of the CHK hospital.[75] Other evidence suggests that soldiers on guard at CHK raped Tutsi girls on several occasions.[76]

58. This evidence, if believed, could lead a reasonable trier of fact to find Nzuwonemeye responsible as a commander for rape by soldiers at CHK hospital in Kigali. Nzuwonemeye's motion for acquittal on rape as a crime against humanity on the basis of Article 6(3) responsibility is therefore denied.

Count 8: Rape as a Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II

59. The Accused Bizimungu and Nzuwonemeye request a judgement of acquittal on count 8, rape as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II, pursuant to Article 4(e) of the Statute. The two Accused request acquittal under 6(3) of the Statute.

60. In light of the evidence discussed above in respect of the charge of rape as a crime against humanity, the Chamber is satisfied that there is some evidence which, if believed, could support a finding by a reasonable trier of fact that Bizimungu and Nzuwonemeye bear command responsibility for rape, as well as humiliating and degrading treatment, in violation of the Geneva Conventions and Additional Protocol II. Bizimungu and Nzuwonemeye's motions for acquittal on rape as war crimes on the basis of Article 6(3) responsibility are therefore denied.

FOR THE ABOVE REASONS, THE CHAMBER

ENTERS a judgement of acquittal for the Accused Augustin Ndindiliyimana as follows:

Count 3: Complicity in Genocide; and

---

[74] Paragraph 112 of the Amended Indictment reads: "During the months of April, May and June 1994, soldiers from the A squad of the Reconnaissance Battalion, led by Innocent Sagahutu and under the command of Major François-Xavier Nzuwonemeye, who guarded the *Centre hospitalier de Kigali*, and their *Interahamwe* accomplices abducted several Tutsi women from the hospital who had come to seek treatment or simply to seek refuge; they raped them or mistreated them. Those rapes often took place inside the kiosk at the entrance to the hospital."

[75] Witness DCJ, T. 2 May 2006, p. 24.

[76] Witness DAR, T. 4 May 2006, pp. 3, 5 and T. 11 May 2006, p. 28.

Count 7: Murder as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II under Article 6(1) of the Statute;

ENTERS a judgement of acquittal for Augustin Bizimungu as follows:

Count 5: Extermination as Crime against Humanity under 6(1) of the Statute; and
Count 7: Murder as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II under Article 6(1) of the Statute;

DENIES the Defence Motions in all other respects.

Arusha, 18 June 2007

Asoka de Silva	Taghrid Hikmet	Seon Ki Park
Presiding Judge	Judge	Judge

[Seal of the Tribunal]