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TRIAL CHAMBER III

Before Judges: Inés Mónica Weinberg de Roca, Presiding
Florence Rita Arrey
Robert Fremr

Registrar: Adama Dieng

Date: 26 June 2007

Original of the Judgment
of the Trial Chamber III
of the ICTR
dated 26 June 2007

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THE PROSECUTOR

v.

Simon BIKINDI

Case No. ICTR-2001-72-T

DECISION ON DEFENCE MOTION FOR JUDGEMENT OF ACQUITTAL

Rule 98 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:

William T. Egebe
Sulaiman Khan
Veronic Wright
Patrick Gabaake
Iain Morley
Amina Ibrahim
Gilain Disengi Mugeyo

Defence Counsel:

Andreas O'Shea
Jean de Dieu Momo

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INTRODUCTION

1. Simon Bikindi ("the Accused") is charged with six counts for the alleged commission of crimes set out in the Statute of the Tribunal (the "Statute"). Pursuant to Article 2 of the Statute, he is charged with conspiracy to commit genocide, genocide, or in the alternative, complicity to commit genocide, and direct and public incitement to commit genocide. The Accused is also charged, pursuant to Article 3 of the Statute, with murder and persecution as crimes against humanity.

2. On 22 February 2007, the Prosecution closed its case, after calling 20 witnesses in 32 days and entering 77 exhibits. In an Oral Decision, on the same day, the Chamber granted the Defence 21 days to file a 98 *bis* Motion for Acquittal.¹ On 15 March 2007, two separate Motions for judgement of acquittal were filed by Mr Momo, Co-Counsel, and by Mr Nderitu, then Lead Counsel, for the Accused. Each of the two Motions calls for acquittal on all counts in the Indictment.² The first Motion, signed by Co-Counsel and the Accused, requests the Chamber not to consider any submission by Lead Counsel insofar as he no longer represents the Accused.³ The Prosecution filed a Response to the Defence Motions on 20 March 2007, and an Addendum to its Response on 21 March 2007.⁴ Co-Counsel for the Accused filed a Reply to the Prosecution Response on 26 March 2007 and an Addendum to its Reply on 27 March 2007.⁵

DELIBERATIONS

Preliminary Matters

3. As a preliminary matter, the Chamber will address the status of the two separate Motions for acquittal filed by Defence Counsel.

4. On 12 February 2007, the Accused submitted a request to the Registry for withdrawal of Lead Counsel Mr Wilfred Nderitu. Pending a decision by the Registry in relation to this request, Mr. Nderitu continued to act as Lead Counsel, representing the Accused during the final weeks of the Prosecution case and filing a Motion, on 15 March

¹ The Chamber's Oral Decision of 22 February 2007.

² "Motion For Acquittal of Simon Bikindi Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence" (Motion by Mr Momo, "Correction à La Requête aux Fins d'Acquittement de Simon Bikindi en Vertu de l'Article 98 *bis* du Règlement de Procédure et de Preuve" (Corrigendum to the Motion by Mr Momo); "Defence Motion for Judgement of Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence" (Motion by Mr Nderitu).

³ Motion by Mr Momo, para. 7.

⁴ "Prosecutor's Response to Defense Motion for a Judgment of Acquittal of Simon Bikindi Pursuant to Rule 98 *bis* of the Rules" (Prosecution Response); "Addendum to Prosecutor's Response to Defense Motion for a Judgment of Acquittal of Simon Bikindi Pursuant to Rule 98 *bis* of the Rules" (Prosecution Addendum).

⁵ "Réplique à la Réponse du Procureur Intitulée 'Prosecutor's Response to Defense Motion for a Judgment of Acquittal of Simon Bikindi Pursuant to Rule 98 *bis* of the Rules'" (Reply by Mr Momo); "Précision sur la Référence de la Note de Bas de Page no 4 Contenue Dans la Réplique de Simon Bikindi à la Réponse du Procureur" (Corrigendum to the Reply of Mr Momo).

2007, for his acquittal.⁶ On 30 March 2007, the Registrar issued a Decision withdrawing Mr. Nderitu's mandate to serve as Defence Counsel for the Accused.⁷

5. The Chamber notes that the duplicate Motions filed by the Defence did not cause any delay in the proceedings and did not cause any prejudice to the Prosecution which was able to respond thereto within the allotted time. In its Response, the Prosecution acknowledges its consideration of both Motions.⁸ In view of these circumstances, the Chamber, in the interests of justice, will consider both Defence submissions.

6. As a second preliminary matter, in response to the Defence submission,⁹ the Chamber notes that the Indictment does not charge the Accused with extermination as a crime against humanity. Accordingly, the Accused has no defence to prepare in respect of this crime.

On the Merits

A. General Principles

7. The Parties' submissions address both the scope of the Chamber's enquiry under Rule 98 *bis* of the Rules and the sufficiency of the evidence in relation to the crimes alleged in the counts of the Indictment. The Motion filed by then Lead Counsel Mr Nderitu also requests the Chamber to take a paragraph - by - paragraph approach with a view to striking out paragraphs in the Indictment for which there is insufficient evidence.¹⁰

8. The Parties agree as to the standard which must be met by the Prosecution evidence to resist a Motion for judgement of acquittal: whether a reasonable trier of fact *could* arrive at a conviction if the Prosecution evidence is accepted.¹¹

9. Rule 98 *bis*, "Motion for Judgement of Acquittal", 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 ... shall order the entry of judgement or acquittal in respect of those counts.

10. As the Appeals Chamber has succinctly stated, the inquiry under Rule 98 *bis* is limited to determining whether "the evidence is insufficient to sustain a conviction":

⁶ T. 12 February 2007 pp. 9-11.

⁷ "Decision Withdrawing the Assignment of Mr Wilfred Nderitu as Lead Counsel for the Accused Simon Bikindi", 30 March 2007.

⁸ Prosecution Response, paras. 4, 31-37.

⁹ Motion by Mr Momo, paras. 23-24.

¹⁰ Motion by Mr Nderitu, para. 48 (b).

¹¹ Motion by Mr Momo, paras. 13-16; Motion by Mr Nderitu, paras. 10-11; Prosecution Response, paras. 15-16.

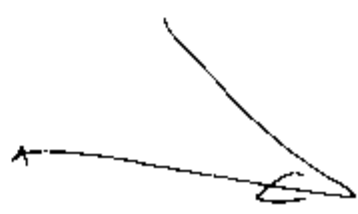
The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond a reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond a reasonable doubt on the prosecution evidence (if accepted) but whether it *could*. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond a reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond a reasonable doubt.¹²

11. Accordingly, under the test established by the Tribunal's jurisprudence, 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".¹³

12. The Motion filed by Mr Nderitu submits that the evidence should be evaluated not only in relation to counts but also in relation to facts alleged in specific paragraphs of the Indictment.¹⁴ In accordance with the test articulated above, the Chamber considers it neither necessary under the Rules nor appropriate to test the sufficiency of evidence in relation to paragraphs in the present Indictment, many of which are inter-dependent. When seized of requests for a judgement of acquittal pursuant to Rule 98 *bis*, Trial Chambers of this Tribunal have almost unanimously examined the evidence in relation to counts without also testing the sufficiency of evidence in relation to each paragraph of an Indictment.¹⁵ Moreover, the Chamber would engage in an "unwarranted substantive evaluation of the quality of much of the Prosecution evidence if it were to pronounce on the sufficiency of evidence in relation to each material fact in each paragraph in the Indictment."¹⁶

13. A Decision pursuant to Rule 98 *bis* does not require the Chamber to assess the credibility and reliability of the evidence unless the Prosecution case "has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case".¹⁷ It is also well-established that the

¹² *Jelisić*, Judgement (AC), 5 July 2001, para. 37, emphasis added.
¹³ *Zigiranyirazo*, "Decision on the Defence Motion Pursuant to Rule 98 *bis*" (TC), 21 February 2007, para. 10; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), para. 8 (emphasis added).
¹⁴ Motion by Mr Nderitu, paras. 16-24, 30-31, 33, 35, 37-40, 43, 48.
¹⁵ *Zigiranyirazo*, "Decision on the Defence Motion Pursuant to Rule 98 *bis*" (TC), 21 February 2007, para. 10; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, paras. 8-9; *Muvunyi*, "Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*" (TC), 13 October 2005, para. 39; *Mpambara*, "Decision on the Defence Motion for Judgement of Acquittal" (TC), 21 October 2005, para. 6; *Rwamakuba*, "Decision on the Defence Motion for Judgement of Acquittal" (TC), 28 October 2005, para. 8; *Bizimungu et al.*, "Decision on Defence Motions Pursuant to Rule 98 *bis* (TC)", 22 November 2005, para. 10.
¹⁶ *Zigiranyirazo*, "Decision on the Defence Motion Pursuant to Rule 98 *bis*" (TC), 21 February 2007, para. 10; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 9.
¹⁷ *Zigiranyirazo*, "Decision on the Defence Motion Pursuant to Rule 98 *bis*" (TC), 21 February 2007, para. 11; *Ndindilyimana et al.*, "Decision on Defence Motions Pursuant to Rule 98 *bis*" (TC), 20 March 2007, para. 7; *Bizimungu et al.*, "Decision on Defence Motions Pursuant to Rule 98 *bis*" (TC), 22 November



Prosecution evidence should be evaluated as a whole, in respect of the "the totality of the evidence" and any reasonably possible inferences.¹⁸ Of course, a decision at the Rule 98 *bis* stage of the proceedings to consider the Prosecution evidence does not preclude the Chamber from finding, at the end of trial, that this evidence fails to establish the Accused's guilt beyond a reasonable doubt.¹⁹

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

14. In the following section, the Chamber will examine the sufficiency of the evidence in relation to each count of the Indictment, in light of the legal standard articulated above.

Count 1: Conspiracy to Commit Genocide

15. Both Defence Motions seek acquittal on Count 1 of the Indictment charging the Accused with conspiracy to commit genocide, under Article 6 (1) of the Statute. Specifically, the Indictment alleges that the Accused, and other named individuals in the political leadership of the MRND or individuals responsible for media programming and operations, planned and executed a common scheme to destroy, in whole or in part, the Tutsi ethnic group of Rwanda. The Indictment further alleges that the Accused collaborated with others "to militarize the MRND *Interahamwe* youth wing and to indoctrinate militias with anti-Tutsi ideology and to disseminate anti-Tutsi propaganda" to commit genocide against the Tutsi.²⁰

16. Conspiracy is constituted when two or more persons agree to pursue a common criminal purpose.²¹ The *actus reus* of the crime, proscribed under Article 2 3(b) of the Statute, is the act of entering into an agreement whose common purpose is to commit genocide. The *mens rea* is the intent to enter into this agreement.²² Neither the *actus reus* nor the *mens rea* exists unless the perpetrator shares with the other co-perpetrators the requisite specific intent of the crime of genocide.²³ This intent may be demonstrated either expressly by the words of the perpetrator or by reasonable deduction from his or

2005, para. 8; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, paras. 10-11; *Hadzihasanovic*, "Decision on Motions for Acquittal Pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence" (TC), 27 September 2004, para. 17.

¹⁸ *Zigiranyirazo*, "Decision on the Defence Motion Pursuant to Rule 98 *bis*" (TC), 21 February 2007, para. 11; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 11; *Muvunyi*, "Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 *bis*" (TC), 13 October 2005, para. 40.

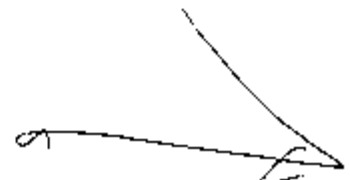
¹⁹ *Zigiranyirazo*, "Decision on the Defence Motion Pursuant to Rule 98 *bis*" (TC), 21 February 2007, para. 11; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 6.

²⁰ Indictment, para. 3.

²¹ *Musema*, Judgement (TC), 27 January 2000, paras. 190-191.

²² *Musema*, Judgement (TC), 27 January 2000, paras. 190-191.

²³ *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, 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.



her conduct.²⁴ 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.²⁵ The existence of the agreement may be inferred from circumstantial evidence, such as evidence of coordinated action by the Accused persons or the institutions they control in pursuit of the unlawful act.²⁶

17. While the Tribunal's temporal jurisdiction is limited to crimes committed between 1 January and 31 December 1994,²⁷ conspiracy is a crime of a continuing nature. For this reason, the Chamber may rely upon evidence of acts that occurred prior to and following 1994 as evidence of a conspiracy that culminated during the temporal jurisdiction of the Tribunal.²⁸

18. The Prosecution evidence is based on the words and deeds of the Accused, sometimes in the presence of named co-conspirators or others, which the Prosecution asserts is indicative of the existence of an alleged agreement.²⁹ According to the Prosecution, the words and deeds must be viewed in the context of "a pattern of purported action" demonstrating that the Accused's musical compositions, live performances and recruitment of *Interahamwe* were elements of a conspiracy to destroy, in whole or in part, the Tutsi.³⁰

19. The Chamber has heard evidence that the Accused allegedly participated in the recruitment of MRND party membership, with the objective of defeating the enemy, defined as the Tutsi.³¹ Witnesses have testified that the Accused, a composer and a musician, participated in the media campaign to defeat the enemy through his instrumental music and song lyrics, which he directly performed or which were broadcast by Télévision Libre des Mille Collines ("RTLM") -- a privately-owned radio station, aligned with extremist political currents in the MRND and the CDR parties.³² There is evidence that the Accused spoke at political rallies and meetings, targeting the Tutsi as

²⁴ *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 12, referring to *The Prosecutor v. Ndindabahizi*, Judgement (TC), 15 July 2004, para. 454.

²⁵ *The Prosecutor v. Nahimana et al.* (TC), Judgement, 3 December 2003, para. 1044.

²⁶ *Niyitegeka* Judgement (TC), 16 May 2003, paras. 427-428, as cited by *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."

²⁷ Article 1 of the Statute.

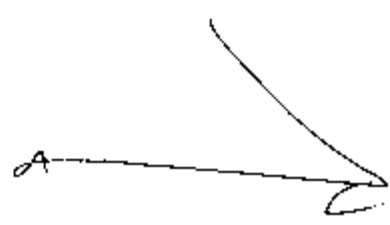
²⁸ *Bikindi*, "Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment" (TC), 22 September 2003, para. 34; *Ndinditziyimana et al.*, "Decision on Defence Motions Pursuant to Rule 98 bis" (TC), 20 March 2007, para. 15.

²⁹ See, e.g., Witnesses ALP, AKJ, AKK, AJZ, AJY, AJS, BGH, AKE, BHJ, AEY, BHI, ALQ, and BHH.

³⁰ Prosecution Response, para. 18 (e).

³¹ See, e.g., Witnesses ALQ (T. 13 October 2006 p. 38; 16 October pp. 2-3, 5-7, 38); BHI (T. 12 October 2006 p. 40; T. 13 October 2006 pp. 3-5, 11).

³² See, e.g., Witnesses BGH (T. 2 October 2006 pp. 36-37; 3 October 2006 pp. 28-30; 5 October 2006 pp. 2-3); BHH (T. 20 February 2007 pp. 7, 10-12); AJZ (T. 25 September 2006 pp. 45-47); AJY (T. 27 September 2006 pp. 26, 29-30); AKJ (T. 20 September 2006 pp. 47-50); ALP (T. 18 September 2006 pp. 35, 39-40); BHJ (T. 10 October 2006 pp. 12-13, 24, 26-27, 32; T. 11 October 2006 p. 11); BHI (T. 13 October 2006 pp. 4-5); AEY (T. 12 October 2006 p.8).



the enemy.³³ According to witnesses, the Accused was often in the company of *Interahamwe*, both prior to and during the 1994 events, and he participated in the campaign to sensitize and provide military training to the *Interahamwe*.³⁴ Witnesses have testified that the Accused made remarks prior to April 1994, which could be interpreted as threats or exhortations to kill civilian Tutsi.³⁵ There is also evidence that, between July 1994 and early 1995, the Accused collaborated with ex-FAR military leaders and former MRND-aligned government officials by composing and performing anti-Tutsi songs, with the objective of regaining power in Rwanda.³⁶

20. In the Chamber's view, the above evidence, if believed, could lead to a finding that the Accused, and others, entered into a conspiracy to commit genocide during the period alleged in the Indictment.

Count 2: Genocide

21. Count 2 of the Indictment charges the Accused with both individual and superior responsibility, under Articles 6(1) and 6(3) of the Statute, respectively, for the commission of genocide against the Tutsi. The elements of genocide, as defined in Article 2 (2) of the Statute, are as follows:

Article 2: Genocide

[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.

22. Articles 6 (1) and 6 (3) of the Statute present the various forms of criminal participation to be considered by the Chamber in its evaluation of the sufficiency of the evidence in relation to the counts charged the Accused.

23. Article 6 (1) of the Statute specifies that a person who "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of" genocide, or any offence over which the Tribunal exercises jurisdiction, incurs individual criminal responsibility. To establish an individual's responsibility for genocide, the Prosecution must adduce evidence not only of the commission of one or more of the above material acts articulated in Article 2 (2) of the Statute but also

³³ See, e.g. Witnesses AKJ (T. 20 September 2006 pp. 48-49); AKK (T. 22 September 2006 pp. 3-5); AJZ (T. 26 September 2006 p. 11); AJY (T. 27 September 2006 p. 30).

³⁴ See, e.g. Witnesses AJS (T. 29 September 2006 pp. 9-10, 12-13); ALQ (T. 13 October 2006 pp. 34-38).

³⁵ See, e.g. Witnesses AJY (T. 27 September 2006 p. 34); AKE (T. 5 October 2006 pp. 34-35).

³⁶ See, e.g. Witness ALQ (T. 16 October 2006 pp. 11-12).

evidence of the individual's specific intent to commit genocide. To prove specific intent, the Prosecution must show that the Accused "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".³⁷ The Accused's specific intent may be derived from direct evidence such as his spoken words or inferred from a number of facts and circumstances such as the Accused's commission of other culpable acts systematically directed against the same group.³⁸

24. Article 6 (3) of the Statute provides that where an offence is committed by a subordinate, the superior is criminally responsible, if the superior knew or had reason to know that the subordinate was about to commit the acts, or had done so, and the superior failed to take the necessary and reasonable measures to prevent these acts or to punish the perpetrators.

25. Much of the evidence concerns the alleged anti-Tutsi messages in the Accused's songs, his alleged performance of this music at MRND and CDR party meetings, his public exhortations to kill the Tutsi, and his alleged acts of support and encouragement of the *Interahamwe*, including members of his *Irindiro* troupe, to engage in genocide. Specifically there is evidence that the Accused exhorted, and traveled in vehicles with, armed *Interahamwe* to attack Tutsi in Nyumyamba Commune in Gisenyi Préfecture in early July 1994.³⁹ There is evidence that, shortly after the killings of Tutsi in Nyumyamba, the Accused addressed a MRND meeting at Umuganda Stadium in Gisenyi, where he called for the Hutu to hunt for and kill the enemy, the Tutsi.⁴⁰ Following the meeting, there were killings of many Tutsi.⁴¹ Evidence also exists that the Accused ordered as well as aided and abetted in the killing of Tutsi in Nyamymba Commune, at the *Commune Rouge*⁴² and at Gisenyi Prison.⁴³

26. In addition, the Chamber has heard evidence which could sustain the Accused's superior responsibility for crimes committed by his subordinates. There is evidence that the Accused, as a nationally recognized performer and director of the *Irindiro* Ballet Troupe, exercised influence over the *Irindiro* dance troupe, who were members of the *Interahamwe*.⁴⁴ There is evidence that the *Interahamwe*, including members of the Accused's troupe, attacked Tutsi civilians in Nyamymba Commune, at the *Commune*

³⁷ *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.")

³⁸ *Jelavic*, Judgement (AC), 5 July 2001, para. 47.

³⁹ See, e.g., Witnesses AJZ (T. 26 September 2006 pp. 6-10); AJY (T. 27 September 2006 pp. 32-34, 37); BKW (T. 17 October 2006 pp. 31-32, 35).

⁴⁰ See, e.g., Witness AJZ (T. 26 September 2006 pp. 10-11).

⁴¹ See, e.g., Witnesses AJZ (26 September 2006 pp. 12-13); AJY (T. 28 September 2006 pp. 6-7).

⁴² See, e.g., Witness BHI (T. 12 October 2006 p. 41; 13 October 2006 pp. 3, 20-21).

⁴³ See, e.g., Witness ALP (T. 18 September 2006 pp. 46-49).

⁴⁴ See, e.g., Witnesses AJY (T. 27 September 2006 pp. 32, 34-35; 28 September 2006 p. 4); AJS (T. 29 September 2006 pp. 11-13); AEY (T. 12 October 2006 p. 12); BHI (T. 13 October 2006 p. 5); ALQ (T. 16 October 2006 pp. 4-5, 9, 13); AJZ (T. 27 September 2006 p. 37).

Rouge, and Gisenyi Prison.⁴⁵ There is further evidence that the Accused, as an authority figure in the *Interahamwe*, was aware of killings perpetrated by the *Interahamwe* and failed to prevent these crimes or to punish the perpetrators.⁴⁶ The Chamber has also heard evidence of crimes of sexual violence committed against Tutsi women by *Interahamwe* allegedly under the Accused's control.⁴⁷

27. On the basis of the evidence discussed in this section and in relation to Count 1, Conspiracy to Commit Genocide, along with all reasonably possible inferences arising therefrom, the Chamber finds that there is evidence which, if believed, could lead a reasonable trier of fact to conclude that the Accused is criminally responsible for genocidal killings as an individual, pursuant to Article 6 (1), and as a superior, pursuant to Article 6 (3), of the Statute.

Count 3: Complicity in Genocide

28. The jurisprudence of this Tribunal has held that aiding and abetting genocide, set out in Article 6 (1), and complicity in genocide, in Article 2 (2) of the Statute, are overlapping, if not substantially similar forms of criminal conduct.⁴⁸ Thus, a finding of aiding and abetting genocide could also establish a conviction for complicity in genocide.⁴⁹ As such, the Chamber considers that the same evidence discussed above in relation to Counts 1 and 2, if believed, could be sufficient to sustain a finding by a reasonable trier of fact that the Accused is guilty of complicity in genocide.

Count 4: Direct and Public Incitement to Commit Genocide

29. The Accused is charged with individual responsibility, under Article 6 (1), for having composed, performed, recorded or disseminated musical compositions which were used in a propaganda campaign to incite the Hutu to commit genocide against the Tutsi.⁵⁰ Incitement, pursuant to Article 2 (3)(c), must be "direct and public". To be direct, the exhortation must be "more than mere vague or indirect suggestion" and should be viewed "in the light of its cultural and linguistic context". To be public, the exhortation must "call for criminal action to a number of individuals in a public place or to members

⁴⁵ See, e.g., Witnesses AJZ (T. 26 September 2006 pp. 7-9); AJY (27 September 2006 pp. 34, 37-38); BHI (T. 13 October 2006 p. 3); ALP (T. 18 September 2006 pp. 46-49).

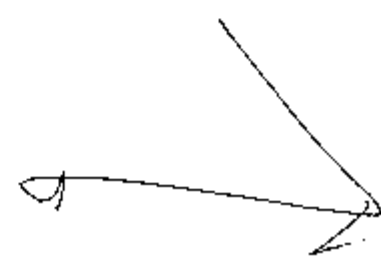
⁴⁶ See, e.g., Witness AEY (T. 12 October 2006 pp. 11-12).

⁴⁷ See, e.g., Witnesses AJY (T. 28 September 2006 pp. 3-4); BHI (T. 13 October 2006 pp. 3, 20-21).

⁴⁸ *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 500-501; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 21, citing *Krstic*, Judgement (AC), 19 April 2004, paras. 138-139.

⁴⁹ *Krstic*, Judgement (AC), 19 April 2004, paras. 138-139 ("As the Trial Chamber observed, there is an overlap between Article 4 (3) [of the ICTY Statute] as the general provision enumerating punishable forms of participation in genocide and Article 7 (1) [of the ICTY Rules] as the general provision for criminal liability which applies to all offences punishable under the Statute, including the offence of genocide ... In this case, the two provisions can be reconciled, because the terms "complicity" and "accomplice" may encompass conduct broader than that of aiding and abetting genocide.")

⁵⁰ Indictment, paras. 31-41.



of the general public at large by such means as the mass media".⁵¹ The *mens rea* is the "intent to directly prompt or provoke another to commit genocide".⁵²

30. There is evidence that the Accused, through the public performance of his anti-Tutsi music and public exhortations at MRND and CDR political meetings, provoked members of the population to pursue and kill Tutsi.⁵³ The Chamber heard evidence that the lyrics in several of the Accused's songs, including *Twasezerege*, *Bene Sebahini* and *Nanga Bahutu*, promoted Hutu solidarity by targeting the Tutsi as the "enemy".⁵⁴ Evidence also exists that recordings of the Accused's songs often preceded and followed RTLM broadcasts which advocated attacks on Tutsi civilians.⁵⁵

31. The Chamber is satisfied that the above evidence, if believed, could lead a reasonable trier of fact to a finding of the Accused's guilt beyond a reasonable doubt for incitement to commit genocide against the Tutsi.

Count 5: Murder as a Crime Against Humanity

32. The Accused has been charged with murder, as a Crime Against Humanity, for his alleged responsibility as an individual and a superior in the killing of Tutsi civilians, pursuant to Articles 6 (1) and 6 (3) of the Statute.⁵⁶ Article 3 of the Statute enumerates the Crimes Against Humanity of which the Accused is charged: murder and persecution. To qualify as a Crime Against Humanity, a specific offence must satisfy two conditions under the Statute: the crime must be committed as "part of a widespread or systematic attack"; and the attack must be directed against "any civilian population on national, political, ethnic, racial or religious grounds". "Widespread" is defined as massive or large-scale, involving many victims; "systematic" refers to an organized pattern of conduct, as distinguished from random or unconnected acts committed by independent actors.⁵⁷ The second condition fosters the *mens rea* requirement unique to crimes against humanity: the offender must know that his act is part of a widespread or systematic attack

⁵¹ *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 22; *Akayesu*, Judgement (TC), 2 September 1998, paras. 557-558.

⁵² *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 22; *Akayesu*, Judgement (TC), 2 September 1998, para. 560.

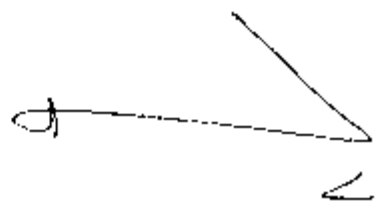
⁵³ See, e.g. Witnesses **BHI** (T. 13 October 2006 p. 21); **AKK** (T. 22 September 2006 pp. 4-5); **AJZ** (T. 26 September 2006 pp. 9-12); **AJY** (T. 27 September 2006 pp. 32-34); **Expert Witness Professor Karangwa** (T. 15 February 2007 p. 19).

⁵⁴ See, e.g. Witnesses **BGH** (T. 5 October 2006 pp. 15-17, 19-21); **AJZ** (T. 25 September 2006 pp. 46-48); **AJY** (T. 27 September pp. 26, 29); **BHI** (T. 13 October 2006 pp. 3-4); **ALP** (T. 18 September 2006 p. 34); **AEY** (T. 12 October 2006 pp. 7-9); **Expert Witness Professor Karangwa** (T. 13 February 2007 pp. 24, 28-29, 33-41, 47-50; 14 February 2007 pp. 3-4, T.15 February 2007 pp. 9, 18-19, 22-25, 41-43, 54.); **Expert Witness Professor Mbonimana** (T. 16 February 2007 pp. 21, 23-27).

⁵⁵ See, e.g. Witnesses **BGH** (T. 2 October 2006 p. 36; T. 3 October 2006 pp. 28-30); **BHI** (T. 20 February 2007 pp. 10-12); **BHJ** (10 October 2006 pp. 26-27).

⁵⁶ *Indictment*, paras. 42-47.

⁵⁷ *Zigiranyirazo*, "Decision on the Defence Motion Pursuant to Rule 98 bis" (TC), 21 February 2007, paras. 18-19; *Bagosora et al.*, "Decision on Motions for Judgement of Acquittal" (TC), 2 February 2005, para. 24. *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 477.



against civilians on discriminatory grounds, although he need not share the discriminatory intent.⁵⁸

33. Murder has been defined by this Tribunal as “the intentional killing of a person, or intentional infliction of grievous bodily harm with the 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.”⁵⁹ Murder, as distinguished from a genocidal killing, must be committed as part of a widespread and systematic attack, whereas genocide must be committed with the specific intent to destroy, in whole or in part, the group to which the victims belong.

34. Much of the evidence above in relation to the count of genocide of civilians also affords proof of the alleged crime of murder, as a crime against humanity. Testimony has been presented that the Accused personally ordered and instigated the murders of identified Tutsi individuals in late June or early July 1994.⁶⁰ There is also evidence which could sustain the Accused’s superior responsibility for murders committed by his subordinates.⁶¹

35. The Chamber is of the view that, if believed, such evidence, along with all reasonable inferences arising therefrom, could lead a reasonable trier of fact to find the Accused guilty, under either Article 6 (1) or 6 (3) of the Statute, for murder, as a crime against humanity.

Count 6: Persecution as a Crime Against Humanity

36. The Indictment alleges that the Accused is individually responsible, pursuant to Article 6 (1) of the Statute, for aiding and abetting the persecution of the Tutsi, as a Crime Against Humanity.⁶² Persecution has been defined by this Tribunal as a gross or blatant denial of a fundamental right, on discriminatory grounds.⁶³ Unlike the other enumerated crimes against humanity, for which knowledge of the overall discriminatory nature of a widespread attack is the minimum *mens rea*, the crime of persecution requires a finding that the offender intended to discriminate, on racial, religious or political grounds.⁶⁴ This Tribunal has found that hate speech, targeting a population on the basis of

⁵⁸ *Zigiranyirazo*, “Decision on the Defence Motion Pursuant to Rule 98 bis” (TC), 21 February 2007, paras 18-19; *Ndindiliyimana et al.*, “Decision on Defence Motions Pursuant to Rule 98 bis” (TC), 20 March 2007, para. 31; *Bagosora et al.*, “Decision on Motions for Judgement of Acquittal” (TC), 2 February 2005, para. 25.

⁵⁹ *Zigiranyirazo*, “Decision on the Defence Motion Pursuant to Rule 98 bis” (TC), 21 February 2007, para 17; *Bagosora et al.*, “Decision on Motions for Judgement of Acquittal” (TC), 2 February 2005, para. 25.

⁶⁰ See, e.g., *Witnesses AJZ* (T. 26 September 2006 p. 10); *AJY* (T. 28 September 2006 pp. 3-4); *ALP* (T. 18 September 2006 pp. 46-49); *BH1* (T. 13 October 2006 pp. 3, 20-21).

⁶¹ See, e.g., *Witnesses AJY* (T. 27 September 2006 p. 37; T. 28 September 2006 p. 4); *AJS* (T. 29 September 2006 pp. 11-13); *AEY* (T. 12 October 2006 p. 12); *BH1* (T. 13 October 2006 p. 5); *ALQ* (T. 16 October 2006 pp. 4-5, 9, 13); *AJZ* (T. 27 September 2006 p. 37).

⁶² Indictment, para. 28.

⁶³ *Bagosora et al.*, “Decision on Motions for Judgement of Acquittal” (TC), 2 February 2005, para. 32, citing *Kupreskic et al.* (TC), 14 January 2001, paras. 619, 621.

⁶⁴ *Bagosora et al.*, “Decision on Motions for Judgement of Acquittal” (TC), 2 February 2005, para. 32.

ethnicity, constitutes persecution by depriving "the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society" and destroying the dignity of the persons in the group under attack.⁶⁵

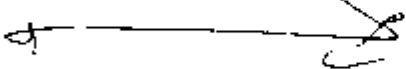
37. The Chamber has heard evidence, detailed in the sections above, that, if believed, the Accused, through his anti-Tutsi songs and his public exhortations, identified and denounced the Tutsi as the enemy prior to and during the 1994 events in Rwanda. Evidence also exists that the Accused's songs, played at MRND and CDR political meetings and broadcast by RTLM, conditioned the Hutu population and fostered a climate of harm against the Tutsi, which promoted the conditions for genocide.⁶⁶

38. Having reviewed the Prosecution evidence as a whole, the Chamber is satisfied that the Prosecution has adduced sufficient evidence which, if believed, could sustain a conviction of the Accused on the counts of the Indictment. While the Defense Motion therefore falls to be rejected, it does not follow that this will necessarily result in a conviction of the Accused on each count at the end of the trial. Even if the Defense fails to adduce exculpatory evidence, the assessment of the evidence in its totality at the end of the trial is different from the evaluation of its sufficiency under Rule 98 bis of the Rules.⁶⁷

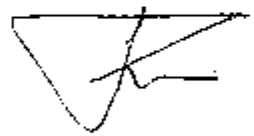
FOR THE ABOVE REASONS, THE CHAMBER

DECLINES the Defence Motion.

Arusha, 26 June 2007


Inés Mónica Weinberg de Roca
Presiding Judge


Florence Rita Arroy
Judge



Robert Fremr
Judge

⁶⁵ *Senaniza*, Judgement (TC), 15 May 2003, para. 350; *Ruggiu*, Judgement (TC), 1 June 2000, para. 21.
⁶⁶ See e.g., *Witnesses AKJ* (T. 20 September 2006 pp. 49-50); *AJZ* (T. 25 September 2006 pp. 45-47, 26 September 2006 p. 11); *BHJ* (T. 10 October 2006 pp. 26, 32); *BHI* (T. 13 October 2006 pp. 4-5); *AKK* (T. 22 September 2006 pp. 3-6); *Expert Witness Professor Karangwa* (T. 15 February 2007 p. 19); *BHH* (T. 20 February 2007 pp. 8-14).
⁶⁷ *Rwamakuba*, "Decision on Motion for Judgement of Acquittal" (TC), 28 October 2005, para. 16.