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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 19 March 2008

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON MOTIONS FOR JUDGEMENT OF ACQUITTAL

Rule 98bis of the Rules of Procedure and Evidence

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INTRODUCTION

1. After the close of the case for the Prosecution, the Chamber issued a Scheduling Order for the filing of motions for judgement of acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence ("Rules"), on 24 December 2007.[1] This was followed by several filings which are detailed in a procedural history annexed to this decision. In addition to the filings made by the Parties under Rule 98*bis* of the Rules, Joseph Nzirorera and Édouard Karemera have also filed separate motions moving the Chamber to decide that the Accused will have no case to answer to some specific paragraphs of the Indictment. Joseph Nzirorera further filed a motion requesting the exclusion of some evidence admitted during the testimony of some Prosecution witnesses and a motion for mistrial. Although the relief sought in all of these motions could have been considered together in light of the interconnection between the issues they raise, the Chamber has decided, in view of the volume of the filings and the consequential potential for complexity, to consider those motions separately in order to facilitate the articulation of its reasoning on each of these issues.

2. In these applications, all three Accused contend that the Prosecution evidence was insufficient to sustain conviction on any count in the Indictment and they request that judgement of acquittal be entered in their favour.[2] To put this application in context, the Chamber recalls that the Prosecution case commenced on 19 September 2005 and closed on 4 December 2007, lasting six trial sessions covering 169 days, during which 29 witnesses testified. In addition, the Chamber took judicial notice of six facts of common knowledge and 107 adjudicated facts.[3] A large number of exhibits, including written documents, maps, photographs, video and audio recordings were also admitted in evidence.

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1 *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, Case No. ICTR-98-44-T ("*Karemera et al.*"), Scheduling Order (TC), 24 December 2007.

2 *Requête pour M. Ngirumpatse sur le fondement de l'article 98* bis *du RPP*, filed on 7 January 2008; *Mémoire en vue de soutenir la demande d'acquittement d'Édouard Karemera en vertu de l'article 98* bis *du Règlement de procédure et de preuve*, filed on 8 January 2008 (but dated 7 January 2008); Joseph Nzirorera's Motion for Judgement of Acquittal, filed on 17 January 2008; Prosecutor's Consolidated Response to Defence Motions for Acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, filed on 31 January 2008; Joseph Nzirorera's Reply Brief: Motion for Judgement of Acquittal, filed on 8 February 2008; *Réplique de M. Ngirumpatse à la Réponse consolidée du Procureur aux requêtes d'acquittement déposées sur le fondement de l'article 98* bis *du Règlement de Procédure et de Preuve*, filed on 27 February 2008; *Seconde soumission de Édouard Karemera en vertu de l'article 98* bis, filed on 3 March 2008; Prosecution's Rejoinder to Nzirorera's Reply Brief, filed on 3 March 2008.

3 *Karemera et al.*, Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006 ("Decision on Judicial Notice").

DELIBERATIONS

3. Rule 98*bis* 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 enter a judgement of acquittal in respect of those counts. The jurisprudence of this Tribunal has previously enunciated the framework for deciding motions for judgement of acquittal under Rule 98*bis* of the Rules.[4] The following is a reproduction of those main guiding principles.

4. The standard which the Prosecution must meet to withstand a motion for judgement of acquittal under Rule 98*bis* 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. The question for the Chamber therefore is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence (if accepted) but whether it could.

5. The Chamber notes that the plain wording of Rule 98*bis* requires it to determine only whether the evidence is insufficient to sustain a conviction on any of the counts charged in the indictment. It is not necessary or appropriate to test the sufficiency of the Prosecution's evidence on every allegation in each paragraph of the indictment. A motion for judgement of acquittal will be dismissed once the Chamber is satisfied that there is some Prosecution evidence which is capable of persuading a Trial Chamber of the guilt of the Accused on the charge being considered, and it will not be necessary to recite all the evidence adduced in support of the charge.

6. 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 from entering a

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[4] *The Prosecutor v. Goran Jelisić*, Case No IT-95-10-A, Judgement (AC), 5 July 2001, paras. 36-37; *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye, and Innocent Sagahutu*, Case No ICTR-2000-56-T ("*Ndindiliyimana et al.*"), Corrigendum to the Decision on Defence Motions for Judgement of Acquittal (TC), 18 June 2007, paras. 6-8; *The Prosecutor v. Protais Zigiranyirazo*, Case No ICTR-01-73-T, Decision on the Defence Motion pursuant to Rule 98*bis* (TC), 21 February 2007, paras. 7-11; *The Prosecutor v. André Rwamakuba*, Case No ICTR-98-44C-T, Decision on Defence Motion for Judgement of Acquittal (TC), 28 October 2005, paras. 4-9; *The Prosecutor v. Jean Mpambara*, Case No ICTR-2001-65-T, Decision on the Defence's Motion for Judgement of Acquittal (TC), 21 October 2005, para. 4; *The Prosecutor v. Tharcisse Muvunyi*, Case No ICTR-2000-55A-T, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal pursuant to Rule 98*bis* (TC), 13 October 2005, paras. 34-40; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No ICTR-98-41-T ("*Bagosora et al.*"), Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, paras. 6-7; *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Elie Ndayambaje*, Joint Case No ICTR-98-42-T, Decision on Defence Motions for Acquittal under Rule 98*bis* (TC), 16 December 2004, paras. 69-73 ("Nyiramasuhuko Rule 98*bis* Decision").

judgement of acquittal on the same count at the end of the case, should it conclude that the Prosecution has failed to prove the guilt of the accused on that count beyond reasonable doubt.

7. The Indictment in this case charges the Accused with four counts of genocide and related offences, two counts of crimes against humanity, and one count of war crimes. Large numbers of persons are alleged to have participated in the commission of the crimes charged. The Indictment alleges that the Accused were the leaders of an established network and identifies the modes of participation by which their individual criminal liability could be established.

8. In his first submission, Mathieu Ngirumpatse disputes the credibility of all the Prosecution witnesses to support his request for the Chamber to enter a judgement of acquittal on all counts.

9. The review under Rule 98*bis* of the Rules does not, however, require an evaluation of the credibility and reliability of the Prosecution evidence, unless it is necessary to consider whether the Prosecution case has completely broken down. In the present case, the Chamber does not find that 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. Mathieu Ngirumpatse's contention in that respect therefore falls to be rejected.

10. In their various submissions, the Accused have submitted that there is insufficient factual basis to hold them liable for the crimes committed by others, and that there is insufficient evidence of their direct participation in the crimes charged. The Chamber will first discuss the modes of participation and then each of the three groups of counts.

Forms of participation

11. The Indictment alleges that the Accused are individually responsible for the crimes in each count of the Indictment through the forms of liability criminalised in Articles 6(1) and 6(3) of the Statute of the Tribunal ("Statute"). The Chamber will give a brief explanation of the principles involved, but in order to avoid duplication, it will review the evidence when considering the counts in the Indictment.

12. Article 6(1) of the Statute prescribes that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the crimes charged shall be held individually responsible for the crime. In addition to these forms of liability specifically mentioned in the Article, the Prosecution has also charged the Accused with liability as being part of a joint criminal enterprise. The legal basis for this form of liability has been recognized since the Appeals Chamber in the *Tadic* case held that participation in a joint criminal enterprise is a form of liability which exists in customary international law and is a form of 'commission' under Article 6(1).[5] In considering this aspect of the case it is necessary to explain briefly that in addition to being held liable for the crime contemplated by a common plan, the Accused could also be liable for another crime committed by the perpetrator if it was foreseeable that that other crime may have been committed and the accused willingly took the risk by voluntarily participating in the common plan.[6] Although his role may differ to that of the actual perpetrator in the fulfilment of the common plan, the Accused may be equally guilty.

13. Article 6(3) of the Statute prescribes that the fact that any of the charges was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

14. Legal challenges were only made in respect of the allegations that the Accused were responsible for crimes committed by subordinates as defined in Article 6(3). Joseph Nzirorera submits that the fact that an accused is a person of great influence is not sufficient to establish the element of "effective control", and that the evidence relating to the relationship of the Accused with the Interahamwe is not conclusive. In the Chamber's opinion, these are challenges which need to be resolved on consideration of the evidence.

15. Joseph Nzirorera also contends that superior responsibility of civilians in a non-international armed conflict was not part of customary international law and he must be acquitted of the form of liability set forth in Article 6(3) even if liability is established under Article 6(1). This submission is flawed, because Rule 98*bis* is quite specific in that it empowers dismissal of counts, not forms of liability. Consequently, if there is evidence that

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[5] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Judgement (AC), 15 July 1999, paras. 188, 195-226.

[6] *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 465.

the Accused participated in a manner that is described in either Article 6(1) or 6(3), the count would not be dismissed. In any event, principles of superior-subordinate relationship have already been applied to civilian superiors who exercise effective control as part of customary international law, and in cases at the ICTR.[7]

Genocide and related counts

16. Counts I – IV charge the Accused with conspiracy to commit genocide, direct incitement to commit genocide, genocide and alternatively complicity in genocide. The definition of genocide in Articles 2 of the Statute includes killing members of a national, ethnical, racial or religious group with intent to destroy, in whole or in part, the group. To establish the crime of conspiracy the Prosecution needs to prove that the Accused agreed to commit the genocide, to establish the incitement the Prosecution needs to prove that the Accused induced or attempted to induce others to commit the genocide. There is inevitable overlap in the factual basis for all these counts which makes it desirable to consider the factual elements together. The evidence for direct incitement to commit genocide will be relied on to prove the genocide and the evidence for both will be relied to prove the conspiracy. In this case, it has already been found that complicity in genocide is a mode of commission akin to aiding and abetting genocide and not a separate crime for which conviction could be entered. Furthermore, this is form of liability to the commission of the crime of genocide.[8]

17. Joseph Nzirorera submits that the crime of conspiracy could not be established unless there was direct evidence of an agreement to commit the crime. Circumstantial evidence is important in international criminal law where it has been frequently used to establish *mens rea*, inchoate crimes such as conspiracy and superior responsibility or other indirect forms of participation.[9] Circumstantial evidence has already been relied on by several

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[7] In *Ntakirutimana* case, the Trial Chamber, quoting *Delalic et al.* Appeal Judgement (paras. 196-198), stated that "Article 6(3) provide that civilian leaders may incur criminal responsibility for acts committed by their subordinates or others under their 'effective control'." *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgement and Sentence (TC), 21 February 2003, para. 819.

[8] *Karemera et al.*, Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment (TC), 18 May 2006.

[9] See Richard MAY & Marieke WIERDA, *International Criminal Evidence*, Transnational Publishers Inc., Ardsley, New York, 2002, International and Comparative Criminal Law Series, paras. 4.44-4.47.

Chambers in proof of conspiracy to commit genocide.[10] The Chamber considers that the agreement can be proved by evidence of circumstances which point, inevitably, to the guilt of the accused. The existence of the requisite agreement may be inferred from conduct of concerted or coordinated action on the part of the group of individuals.[11]

18. The Chamber has already ruled that it is a fact of common knowledge that a genocide occurred Rwanda against the Tutsi group between 6 April and 17 July 1994.

19. Witnesses testified that the political governance of Rwanda had developed along ethnic lines with initial power being held by the Tutsi.[12] Since 1959, Hutu political parties controlled the government and conducted policies which led to large numbers of the Tutsi population living in exile.[13] Since 1975 the governing Hutu political party was the MRND under the leadership of President Habyarimana.[14] The Tutsi in exile became militarized and over the years conducted armed incursions into Rwanda.[15] They became organized as the RPF and developed a political base within the country. Evidence was led that, faced with the political and military challenges, the MRND developed a political theory of using ethnic arguments to unite the Hutu population against the RPF threats which the witnesses argued were identical with threats by the Tutsi.[16]

20. The Chamber has heard evidence that by April 1994, the Accused were the leaders of the MRND: Mathieu Ngirumpatse as President, Joseph Nzirorera as the National Secretary and Édouard Karemera as Vice-President. The evidence that they constituted the executive of the MRND leads to the inference that they agreed among themselves and with others about its policies.

21. The policies of the MRND could be inferred from statements made by the Accused and other leaders. These statements, which were entered into evidence during the trial and to

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10 *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence (TC), 16 May 2003, paras. 427-428.

11 *Ferdinand Nahimana, Jean-Bosco Barayagwiza, et Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, paras. 896-897 ("Media Judgement"); see also *Nyiramasuhuko* Rule 98*bis* Decision, para. 97.

12 Witness FH, T. 12 July 2007 p. 46 (Closed Session); Witness UB, T. 24 February 2006 p. 23.

13 Witness G, T. 27 October 2005 p. 57; Witness Ahmed Napoléon Mbonyunkiza, T. 28 October 2005 p. 40; Witness AWD, T. 12 November 2007, p. 32; Witness UB, T. 24 February 2006 p. 21.

14 Witness GOB, T. 22 October 2007 p. 23; Witness UB, T. 23 February 2006 p. 17.

15 Witness G, T. 25 October 2005 p. 19; Witness UB, T. 24 February 2006 p. 19-24 and T. 3 March 2006 p. 13; Witness GOB, T. 22 October 2007 pp. 34-37; Witness T, T. 22 May 2006 p. 49; Witness G, T. 25 October 2007 pp. 24-25.

16 Witness AWD, T. 7 November 2007 p. 25, 32-33; Witness T, T. 24 May 2006 pp. 25-29; Witness G, T. 25 October 2005 pp. 18-20; Witness ZF, T. 5 June 2006 p. 63; Witness GK, T. 10 December 2006 p. 8 and T. 11 December 2006 p. 35.

which some witnesses testified, also provide evidence of direct and public incitement to commit genocide, and of instigating and ordering the genocide. The Chamber considers it unnecessary to examine the entirety of the evidence and merely recalls some evidence of this character.

22. According to the Prosecution evidence, Mathieu Ngirumpatse was one of the leaders who addressed an MRND rally at Nyamirambo Stadium in Kigali on 16 January 1994. Prosecution Witness AWD testified that he understood that Ngirumpatse was calling the population to come together to fight the Tutsi.[17] Prosecution Witness UB testified that he understood this speech was a call to kill Tutsi.[18]

23. Prosecution Witness QBG testified that on 18 April 1994, Édouard Karemera and Mathieu Ngirumpatse, among others, spoke at a meeting of bourgmestres and political party leaders in Gitarama prefecture after he had voiced his opposition to the killings by *Interahamwe* in the prefecture. He testified that, shortly after these speeches, mass killings begin in Gitarama.[19]

24. Prosecution Witnesses GBU and GAV and others testified that at the swearing-in ceremony of Juvénal Kajelijeli as *bourgmestre* in June 1994 Joseph Nzirorera praised the *Interahamwe* for their work.[20] From Joseph Nzirorera's speech, those witnesses understood that by killing the Tutsis the *Interahamwe* had done something good and that Kajelijeli was sworn in because he had taken part in exterminating the Tutsi.[21]

25. There is also evidence that Joseph Nzirorera chaired a meeting of national level Interahamwe leaders at the Kigali-ville *préfecture* office in late April 1994 during which he praised the *Interahamwe* for their killing of "the enemy" and their conduct at roadblocks.[22] Further, evidence was adduced that Édouard Karemera attended a pacification meeting in Ruhengeri on 3 May 1994 in his capacity as Vice-President of the MRND, and called upon the *Interahamwe* to work with certain other youth to flush out the "enemy".[23]

26. The Prosecution has invited the inference that the Accused planned, prepared for and executed the genocide through the *Interahamwe*. This would be evidence of commission of

17 Witness AWD, 10 October 2007 p. 25 and T. 12 November 2007 p. 53
18 Witness UB, T. 24 February 2006 pp. 22-24.
19 Witness QBG, T. 19 July 2007 pp. 49-51.
20 Witness GBU, T. 4 December 2006 p. 36-38; Witness ANU, T. 13 June 2007 p. 42-47; Witness GAV, T. 4 October 2007 p. 64-65.
21 Witness GAV, T. 4 October 2007 pp. 64-65.
22 Witness UB, T. 28 February 2006 pp. 29-30; *see also* Witness ALG, T. 26 October 2006 p. 58; Witness AWE, T. 4 July 2007 pp. 30-32.
23 Witness GK, T. 8 December 2006 pp. 31-32, 45. See also Exhibit P-82, p. 10.

genocide and part of the circumstances leading to proof that the Accused had agreed to commit genocide.

27. Several Prosecution witnesses testified that the MRND formed, trained and armed the *Interahamwe* as its youth wing[24] operating under the direct control of the Accused as the MRND executive.[25] Witness UB testified that he knew that the *Interahamwe* reported to Mathieu Ngirumpatse.[26]

28. Several Prosecution witnesses testified that the *Interahamwe* stopped people at roadblocks, forced them to show their identity cards, and killed those who were identified as Tutsi[27] and raped Tutsi women.[28] Tutsi killed at these roadblocks were buried in mass graves or their corpses lay on the ground.[29] Witnesses testified that the Accused as MRND ordered the installation of roadblocks,[30] and that Mathieu Ngirumpatse and Joseph Nzirorera were present at roadblocks in Kigali on 12 April 1994 and encouraged the *Interahamwe* that were manning them.[31]

29. Prosecution Witness AMM testified that Édouard Karemera observed *Interahamwe* attacking and killing hundreds of Tutsi who had taken refuge in Bisesero on or about 13 May 1994; that approximately five days later, Édouard Karemera and others were present at a location near Mabuga School on 18 May 1994, when buses full of soldiers arrived. The soldiers disembarked attacked Tutsi men, women and children.[32] Witness AMN testified that Édouard Karemera, Alfred Musema and Kayishema, among others, were in Muyunyi hills in Bisesero in mid May 1994, where soldiers, civilians and *Interahamwe* had gathered. According to the witness, after Édouard Karemera spoke to the officials the *Interahamwe*, soldiers and civilians who were present were ordered by them to surround the Tutsi in the area and kill them; the killing continued all day.[33]

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24 Witness ALG, T. 1 November 2006 pp. 21-31; Witness ANU, T. 13 June 2007 p. 20; Witness GOB, T. 22 October 2007 pp. 25-27.
25 Witness GOB, T. 25 October 2007 pp. 20, 65; Witness AMO, T. 25 October 2007 p. 34.
26 Witness UB, T. 27 February 2006 pp. 61-63.
27 Witness ALG, T. 26 October 2006 p. 60; Witness HH, T. 9 November 2006 p. 12; Witness AMO, T. 30 November 2007 p. 9; Witness UB, T. 28 February 2006 p. 10.
28 Witness ANU, T. 13 June 2007 pp. 27-29.
29 Witness AMO, T. 30 November 2007 p. 9; Witness GBY, T. 25 June 2007 p. 64.
30 Witness HH, T. 9 November 2006 pp. 9-10.; Witness ALG, T. 26 October 2006 p. 60-61; Witness AWE, T. 4 July 2007 pp. 24-27.
31 Witness Jean-Bosco Twahirwa, T. 25 June 2007 p. 64; Witness UB, T. 28 February 2006 pp. 29-30; Witness ALG, T. 26 October 2006 p. 58; Witness AWE, T. 4 July 2007 pp. 30-31; Witness BDX, T. 9 October 2007 pp. 36-37.
32 Witness AMM, T. 19 June 2007 pp. 18-28. The other persons allegedly present included Clément Kayishema, and Cyprién Munyampundu.
33 Witness AMN, T. 1 October 2007 pp. 25-27.

30. Evidence was led that by early January 1994, the MRND, the military and *Interahamwe* coordinated to stockpile weapons, train *Interahamwe*, and identify Tutsi in Kigali[34]. There is evidence that Édouard Karemera distributed weapons in Bwakirwa commune in April 1994.[35] Witness HH testified that during a meeting held in mid 1994, which was attended by *Interahamwe* and military members, Mathieu Ngirumpatse promised to arrange for the distribution of further ammunition to the *Interahamwe*, and the ammunition was made available a few days later.[36]

31. Witness HH testified that by 7 April 1994 national *Interahamwe* leaders relayed instructions from the MRND for *Interahamwe* erect and man roadblocks.[37] The Chamber also heard evidence that on 12 April 1994, both Ngirumpatse and Nzirorera were present at roadblocks in Kigali and encouraged the *Interahamwe* who were manning them.[38] Witness BDX testified that Joseph Nzirorera addressed the *Interahamwe* at a roadblock in Nyabugogo. He interpreted Joseph Nzirorera's instructions as meaning that no Tutsi should be allowed to escape.

32. There was evidence that the Accused were connected to the Interim Government through the MRND. During May and June 1994, Édouard Karemera was appointed Minister of the Interior and Joseph Nzirorera as President of the National Assembly. There is evidence that the Interim Government implemented a civil defence program under Édouard Karemera's Ministry of the Interior, which was designed to legitimate the killing of the Tutsi.[39] There is also evidence that local government officials who resisted the campaign of genocide or attempted to protect Tutsis were removed from office and replaced with others who supported the killings.[40]

33. However, the Accused, during the cross examination of Prosecution witnesses, challenged the factual base of several of the facts presented and offered exculpatory explanations for the formation and operations of the *Interahamwe*.[41] They are denying

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34 Witness Frank Claeys, T. 21 November 2006 pp. 64-66.
35 Witness AXA, T. 20 November 2007 p. 19.
36 Witness HH, T. 21 November 2006 p. 19.
37 Witness HH, T. 9 November 2006 pp. 9-10.; Witness ALG, T. 26 October 2006 p. 60-61; Witness AWE, T. 4 July 2007 pp. 24-27.
38 Witness Jean-Bosco Twahirwa, T. 25 June 2007 p. 64; Witness UB, T. 28 February 2006 pp. 29-30; Witness ALG, T. 26 October 2006 p. 58; Witness AWE, T. 4 July 2007 pp. 30-31; Witness BDX, T. 9 October 2007 pp. 36-37.
39 Witness T, T. 6 June 2006 pp. 21-22; *see also* Exhibit P-58, P-59 and P-60.
40 Witness Fidèle Uwizeye, T. 19 July 2007 pp. 55-56 and T. 20 July 2007 pp. 2-4; Witness FH, T. 12 July 2007 p. 23.
41 Witness UB, T. 22 February 2006 p. 29; Witness T, T. 29 May 2006 p. 53; Witness ALG, T. 26 October 2006 p. 48; Witness HH, T. 16 November 2006 p. 17.

responsibility for the mass killings which they allege were a spontaneous and angry reaction amongst the populace to the assassination of President Habyarimana.[42]

34. These are issues which ought not to be resolved at this Rule 98*bis* review, but rather when the evidence as a whole is being considered at the end of the case. After having considered the Prosecution evidence as a whole, the Chamber considers that there is sufficient evidence which could, if believed, allow a reasonable trier of fact to convict each of the Accused on the count of genocide.

Crimes against Humanity

35. The Indictment charges the Accused with two crimes against humanity, rape in count 5 and extermination in count 6. According to Article 3 of the Statute, rape and extermination can be prosecuted as crimes against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

36. The distinguishing feature of crimes against humanity is that they are directed against a civilian population and not merely against an individual. In this case, the Chamber has already accepted as a fact of common knowledge that widespread and systematic attacks were conducted against the civilian population of Tutsi identification between 6 April and 17 July 1994.[43]

37. In count 5, the Indictment alleges that the Accused are criminally responsible for rapes committed as part of the widespread and systematic attacks against the civilian population on ethnic or political opposition grounds. There is no allegation of direct commission by the Accused. They are alleged to be responsible as superiors for the rapes committed by the *Interahamwe* and under the doctrine of joint criminal enterprise as described above.

38. Apart from the challenge that there is no evidence that the rapes alleged were specifically contemplated, discussed, or otherwise foreseeable to the Accused nor of their material ability to prevent or punish acts of rape, Édouard Karemera submits that the Chamber should not consider the judicially noticed facts concerning the occurrence of rapes during the genocide on the basis that by accepting these facts, the Prosecution was able to

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42 Witness G, T. 18 October 2005 pp. 18-19 and T. 25 October 2005 p. 36.
43 Decision on Judicial Notice.

avoid having to prove these rapes, and the Defence were prevented from challenging the evidence under an adversarial process. This argument must be rejected because Rule 89(C) of the Rules specifically authorizes the Chamber to admit any relevant evidence which has probative value. The Chamber considers that the proper principles were applied in the decision to admit this evidence and that there has been no prejudice to Karemera who can adduce rebuttal evidence if he wishes. The Chamber notes that the admissibility of evidence is not to be confused with the weight to be attached to it. The testimony will be reviewed to determine the extent to which it can be relied in the final evaluation of the testimony.

39. There were Prosecution eyewitnesses to rapes conducted by *Interahamwe*.[44] Witness FH testified that a meeting was convened by *Préfet* Uwizeye on 18 April 1994 to discuss various problems and security issues. According to this witness, Édouard Karemera was present at this meeting where concerns were raised about, for instance, soldiers in Gitarama who asked people to show their identity cards and raped women.[45] Witness UB testified that the rape of Tutsi women and girls by *Interahamwe* and soldiers was widespread and commonly known between 7 April and late June 1994.[46] There is also evidence that *Interahamwe* stopped Tutsi women at roadblocks and raped them.[47]

40. The Chamber considers that there is evidence about the relationship between the Accused and the *Interahamwe* outlined in discussing count of genocide. There is evidence from which the Chamber can draw inferences about the knowledge of the Accused about the rapes and the extent to which the rapes were foreseeable and the ability of the Accused to prevent and punish perpetrators of rape.

41. With regard to extermination as a crime against humanity, the Indictment alleges that each of the Accused were responsible for killing or causing to be killed Tutsi persons as part of a widespread and systematic attack on the Tutsi civilian population and political opponents to the MRND and Hutu Power, between 6 April and 17 July 1994.

42. Although Joseph Nzirorera and Mathieu Ngirumpatse challenge the sufficiency of the evidence and Mathieu Ngirumpatse's contends that his speech on 16 January 1994 was a call for unity and peace, the Chamber considers that the evidence highlighted under the counts for genocide counts if believed could sustain a conviction for extermination as crime against humanity.

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44 Witness T, T. 31 May 2006 p. 7; Witness GBU, 4 December 2006 pp. 25 and 39.
45 Witness FH, T. 12 July 2007 pp. 4-7.
46 Witness UB, T. 28 February 2006 pp. 11-12, 18-21.
47 Witness ANU, T. 13 June 2007 pp. 27-29.

War Crimes

43. The three Accused seek acquittal on count 7 of the Indictment under Article 4 of the Statute, which charges them with responsibility for murder, seriously harming, and/or otherwise treating in a cruel manner persons taking no active part in the hostilities in connection with an armed conflict not of an international nature, as a serious violation of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II.

44. To qualify as a crime under Article 4 of the Statute, the Prosecution must show: (i) the existence of a non-international armed conflict in the territory of the concerned State; (ii) a nexus between the alleged violation and the armed conflict; and (iii) that the victims were a protected group, specifically, that they were not taking part in the hostilities at the time of the alleged violations.[48] None of the Accused dispute that the armed conflict was non-international in character.

45. Joseph Nzirorera submits that the Prosecution evidence shows that the authorities of the Habyarimana regime believed the conflict to be an international one in which the RPF acted as a proxy for the Government of Uganda and consequently did not believe that they were engaged in an armed conflict of a non-international character. The suggestion that proof that the Accused thought the conflict was international would be a defence for crimes against non combatants to an armed conflict of a non international character has to be rejected because the acts of murder and violence to life, health and physical and mental well-being of persons against non combatants in armed conflict are considered as offence whether the conflict has an international or non international character.

46. Joseph Nzirorera submits that the offence of "violence to life, health and physical and mental well-being of persons" was not sufficiently defined in customary international law in 1994, and that therefore a finding of guilty on this count would violate the principle of *nullum crimen sine lege*. The Chamber notes that it has already ruled on and denied this contention.[49] Contrary to Nzirorera's request, the Chamber does not find that the close of the Prosecution is as such a circumstance that would justify for the Chamber to reconsider this decision.

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[48] See e.g. *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza*, Case No. ICTR-99-50-T ("*Bizimungu et al.*"), Decision on Defence Motions Pursuant to Rule 98*bis* (TC), 22 November 2005, para. 99 ("Bizimungu Rule 98*bis* Decision"); see also *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23/1-A, Judgement (AC), 12 June 2002, para. 59.

[49] *Karemera et al.*, Decision on Count Seven of the Amended Indictment – Violence to Life, health and physical and mental well-being of persons (TC), 5 August 2005.

84

47. Joseph Nzirorera and Édouard Karemera submit that the Prosecution failed to make direct link between acts falling within Common Article III and the charges against them. The nexus factor is established if the alleged offence is closely related to the armed conflict.[50] In considering the testimony on genocide and related counts reference has already been made to the testimony linking the killings of the Tutsi population with the military incursions of the RPF. There was also testimony of the civil defence programme to set up and man roadblocks to assist the Rwandan Army engaged in battle against the RPF,[51] roadblocks at which civilians killed.[52] This is some of the evidence from which requisite nexus between the alleged offence and the non-international armed conflict could be inferred.

FOR THE ABOVE REASONS THE CHAMBER

DENIES the Defence Motions in all respects.

Arusha, 17 March 2008, done in English.

Dennis C. M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagn Joensen
Judge

[Seal of the Tribunal]

50 Bizimungu Rule 98 *bis* Decision, para. 102.
51 Witness ALG, T. 2 November 2006 pp. 63-64; Witness AWE, T. 4 July 2007 pp. 23-24.
52 Witness AWE, T. 4 July 2007 pp. 23-24.

PROCEDURAL HISTORY

48. In its Scheduling Order of 24 December 2007, the Chamber ordered, *inter alia*, that each of the Accused file any motion for judgement of acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence ("Rules") no later than 7 January 2008.[53] Édouard Karemera and Mathieu Ngirumpatse filed their respective motions for judgement of acquittal on 7 January 2008.[54] On the same day, Joseph Nzirorera filed a motion requesting an extension of time to file his Rule 98*bis* motion for judgement of acquittal.[55] The Prosecution did not oppose this motion, but requested a commensurate extension of time to file its consolidated response.[56] On 15 January 2008, the Chamber denied Joseph Nzirorera's motion for extension of time and ordered him to file his motion for judgement of acquittal by 18 January 2008.[57] On 17 January 2008, Joseph Nzirorera filed both a motion for judgement of acquittal.[58]

49. On 22 January 2008 the Chamber issued a further Scheduling Order, requiring that the Prosecution file its response by 29 January 2008, and the defence were permitted to respond by 6 February 2008.[59] The Prosecution requested an extension of time of two days to file its consolidated reply on 31 January 2008.[60] The Chamber issued a decision on 30 January 2008 granting the prosecution's request and ordering that the Consolidated Response be filed by the following day, the chamber also granted the Accused an additional two days to respond, to be filed no later than 8 February 2008.[61] The Prosecution duly filed its Consolidated Response on 31 January 2008.[62] Joseph Nzirorera subsequently filed his Reply Brief.[63]

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53 *Prosecution v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera* ("*Karemera et al.*"), Case No. ICTR-98-44-T, Scheduling Order (TC), 24 December 2007. *See also Karemera et al.* T. 5 December 2007 p. 32.

54 Requête pour M. Ngirumpatse sur le fondement de l'article 98*bis* du RPP, filed on 7 January 2008; Mémoire en vue de soutenir la demande d'acquittement d'Édouard Karemera en vertu de l'article 98 *bis* du Règlement de procédure et de preuve, filed on 7 January 2008 (the Chamber notes that the Registry's stamp indicates the date of archival filing as 8 January 2008).

55 Joseph Nzirorera's Motion for Extension of Time, filed on 7 January 2008.

56 Prosecution's Response to Joseph Nzirorera's Motion for Extension of Time, filed on 10 January 2008.

57 *Karemera et al.*, Decision on Joseph Nzirorera's Motion for Extension of Time (TC), 15 January 2008.

58 Joseph Nzirorera's Motion for Judgement of Acquittal, filed on 17 January 2008 ("Nzirorera's Motion").

59 *Karemera et al.*, Scheduling Order (TC), 22 January 2008.

60 Prosecution's Application for Extension of Time to File Consolidated Response to Defence Motions for Judgment of Acquittal, filed on 29 January 2008.

61 See *Karemera et. al.*, Decision on the Prosecution's Application for Extension of Time to File Consolidated Response to Defence Motions for Judgment of Acquittal (TC), 30 January 2008.

62 Prosecution's Consolidated Response to Defence Motions for Judgment of Acquittal, filed on 31 January 2008 ("Prosecution's Consolidated Response").

63 Joseph Nzirorera's Reply Brief: Motion for Judgement of Acquittal, filed on 8 February 2008 ("Nzirorera's Reply Brief").

Whilst Mathieu Ngirumpatse and Édouard Karemera filed requests for extension of time, pending receipt of a French translation of the Prosecution's Consolidated Response.[64] The Chamber granted their requests in part, permitting the accused to file their responses after receipt of the translation, by 27 February 2008.[65] Mathieu Ngirumpatse duly filed his response by the required date.[66] Édouard Karemera filed a request for an extension of time to respond, which request was denied.[67] He filed his response on 3 March 2008.[68] On the same day the Prosecution filed a rejoinder to Joseph Nzirorera's Reply Brief.[69]

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[64] Requête de M. Ngirumpatse aux fins d'extension du délai du dépôt de son mémoire en réplique à la Réponse du Procureur conformément à l'article 98*bis* du Règlement de Procédure et de Preuve, déposée le 5 février 2008; Requête en Extension de délai pour le dépôt de la seconde soumission de Édouard Karemera en vertu de l'article 98 bis, déposée le 6 février 2008.

[65] *Karemera et. al.*, Décision sur les requêtes d'Édouard Karemera et Mathieu Ngirumpatse en prorogation de délai, 13 February 2008.

[66] Réplique de M. Ngirumpatse à la Réponse consolidée du Procureur aux requêtes d'acquittement déposées sur le fondement de l'article 98*bis* du Règlement de Procédure et de Preuve, filed 27 February 2008 ("Ngirumpatse's Second Reply").

[67] Requête urgente en extension de delai pour le dépot de la seconde soumission de Édouard Karemera en vertu de l'article 98*bis*, filed on 28 February 2008; *Karemera et. al.*, Décision relative à la requête urgente d'Édouard Karemera en prorogation de délai supplémentaire pour le dépôt de sa réplique à la réponse du Procureur en vertu de l'article 98 bis du Règlement (TC), 28 February 2008.

[68] Seconde soumission de Édouard Karemera en vertu de l'article 98*bis*, filed on 3 March 2008 ("Karemera's Second Reply").

[69] Prosecution's Rejoinder to Nzirorera's Reply Brief, filed on 3 March 2008.