

ICTR-99-54-T  
14-10-2010  
(8711 - 8700)

8711  
Mwamp



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER II**

Before: Judge William H. Sekule, Presiding  
Judge Solomy Balungi Bossa  
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 14 October 2010

**The PROSECUTOR**

v.

**Augustin NGIRABATWARE**

Case No. ICTR-99-54-T

JUDICIAL RECORDS ARCHIVES  
2010 OCT 14 P 3 12

**DECISION ON DEFENCE MOTION FOR JUDGEMENT OF ACQUITTAL**

**Office of the Prosecutor**

Mr. Wallace Kapaya  
Mr. William Egbe  
Ms. Veronic Wright  
Mr. Patrick Gabaake  
Mr. Iskandar Ismail  
Mr. Michael Kalisa  
Ms. Faria Rekkas

**Defence Counsel**

Mr. Peter Herbert  
Ms. Mylène Dimitri  
Mr. Deogratias Sebureze  
Ms. Anne-Gaëlle Denier  
Ms. Chloé Gaden-Gistucci  
Mr. Nick Fram  
Ms. Véronique Ethier

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

**SITTING** as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Chamber");

**BEING SEIZED** of the "Defence Motion Requesting Acquittal Pursuant to Rules 54 and 98 bis of the Rules of Procedure and Evidence", filed confidentially on 7 September 2010 (the "Motion");

**CONSIDERING:**

- (a) The "Prosecution's Response to Defence Motion for Acquittal Under Rule 98 (bis) of the Rules of Procedure and Evidence", filed confidentially on 15 September 2010 (the "Response"); and
- (b) The "Defence Reply to Prosecution Response to Defence Motion for Acquittal Under Rule 98 bis of the Rules of Procedure and Evidence", filed confidentially on 23 September 2010 (the "Reply");

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

**NOW DECIDES** the Motion pursuant to Rule 98bis of the Rules.

### INTRODUCTION

1. In an Amended Indictment dated 13 April 2009 (the "Indictment"),<sup>1</sup> the Prosecution charges N girabatware with six counts: Conspiracy to Commit Genocide (Count 1), Genocide or, alternatively, Complicity in Genocide (Counts 2 and 3), Direct and Public Incitement to Commit Genocide (Count 4), Extermination as a Crime Against Humanity (Count 5), and Rape as a Crime Against Humanity (Count 6). N girabatware has pleaded not guilty to these charges.

2. The Prosecution case commenced on 23 September 2009 and spanned three sessions: from 23 September through 22 October 2009, from 25 January through 18 March 2010, and from 23 August through 31 August 2010. Over the course of 53 trial days, the Prosecution called 20 witnesses and tendered 28 exhibits.

### SUBMISSIONS OF THE PARTIES

#### *Defence Motion*

3. The Defence seeks a judgement of acquittal on 45 paragraphs of the Indictment, specifically paragraphs 10 through 14 (Count 1), 15, 19 through 23, 25, 26, and 28

<sup>1</sup> Amended Indictment, dated 13 April 2009 ("Indictment").

through 38 (Counts 2 and 3), 39, 40, and 42 through 47 (Count 4), 51 through 60 (Count 5), and 61 through 63 (Count 6). The Defence submits that this should entail a full acquittal on Counts 1, 5 and 6. Alternatively, the Defence prays that the Chamber strike the allegations in the contested paragraphs, or indicate that it does not intend to consider them in its final deliberations.<sup>2</sup>

4. The Defence submits that the Chamber has the authority to focus on specific paragraphs on the Indictment. Although some other Trial Chambers have chosen to assess only the counts as a whole, the reasons for doing so are not present in this case. This Chamber should adopt a paragraph-focused approach because it would protect Ngirabatware's rights, benefit judicial economy and limit the expenditure of resources.<sup>3</sup>

5. Both the Prosecution's Pre-Trial Brief, and its December 2009 motion for leave to vary its witness list, outline which witnesses were to testify on which Indictment paragraphs. Neither submission identifies a testifying witness who was anticipated to address paragraphs 33 through 36, or 56 through 59. No witness actually provided evidence regarding these paragraphs.<sup>4</sup>

6. According to the Defence, the evidence pertaining to paragraphs 22, 23 and 40 falls outside of the Tribunal's temporal jurisdiction, and therefore can not serve as a basis for conviction. Any testimony about paragraphs 42, and 44 through 47 alleges meetings in a private home, or instructions given to persons manning a roadblock, which could not sustain a conviction for direct and public incitement to commit genocide. No conviction for extermination as a crime against humanity is possible based solely on one remaining paragraph of the Indictment.<sup>5</sup>

7. As for the other paragraphs contested by the Defence, the Prosecution adduced either no relevant evidence, or else evidence that must be found insufficient to sustain a conviction.<sup>6</sup>

<sup>2</sup> Motion, paras. 4-5, 69, 207, 235, 252-253. Count 5 is comprised of paragraphs 50 through 60 of the Indictment. The Defence contests paragraphs 51 through 60, and submits that a single remaining paragraph could not sustain a conviction for extermination as a crime against humanity. Although the Defence does not request an acquittal on Count 5 in its introduction or prayer for relief, the Chamber considers that paragraphs 207 and 235 of the Motion state this submission clearly enough for the Chamber to treat this requested acquittal as included in the Motion. Moreover, the Prosecution responded to this specific submission. See Response, paras. 76, 79-80.

<sup>3</sup> Motion, paras. 18-48.

<sup>4</sup> *Id.*, paras. 49-51, 155, 206, 234, 252, pp. 20-23, referring to Prosecutor's Extremely Urgent Motion for Leave to Vary the List of Witnesses To Be Called and Extension of Witness Protection Orders [made under the provisions of Rules 73 *bis* (E), 54, 69, 75 of the Rules of Procedure and Evidence and Article 21 of the Statute of the Tribunal], 22 December 2009; The Prosecutor's Revised Pre-Trial Brief (Filed pursuant to Court Order dated 19 May 2009 and Rule 73 (B) (i) *bis* of the Rules of Procedure and Evidence), 25 May 2009.

<sup>5</sup> Motion, paras. 5, 109, 112-113, 156, 158, 160-162, 171, 173-175, 179-180, 188-189, 193-194, 198-199, 203-205, 207, 235.

<sup>6</sup> *Id.*, paras. 52, 53-69 (concentrating on the paragraphs contested by the Defence in support of Count 1), 70-155 (Counts 2 and 3), 156-205 (Count 4), 206-235 (Count 5), 236-251 (Count 6), 252.

**Prosecution Response**

8. The Prosecution submits that it has adduced sufficient evidence for a reasonable trier of fact to sustain a conviction on all six counts of the Indictment.<sup>7</sup>

9. The Prosecution concedes that it did not lead evidence on certain allegations, and seeks the Chamber's permission to withdraw them. These allegations concern a meeting in Butare (paragraphs 10, 11, 37, and 56 through 59), a meeting at Gerson Nzabahiranya's house (paragraphs 12 and 59), diversion of funds for the purchase of weapons (paragraphs 15 and 38), the killing of Immacule Dusabe (paragraphs 31, 47 and 54), and the killing of Tutsis pursuant to a meeting at Captain Ildefonse Nizeyimana's house (paragraphs 32 and 34).<sup>8</sup>

10. In the Prosecution's view, Rule 98bis does not require the Chamber to analyze specific paragraphs, and the Chamber should refrain from adopting such an approach. At times, the allegations are so interrelated that considering specific paragraphs is not an option.<sup>9</sup> Instead, the Chamber should concentrate on the counts as a whole. If the Prosecution has not led any evidence on a particular paragraph, the Defence need not call evidence to rebut the allegations in that paragraph.<sup>10</sup>

11. Identifying a witness who is anticipated to testify about a particular allegation does not preclude other witnesses from addressing the same issue. The Defence can not claim that it was ambushed by Prosecution evidence. In any event, and in comparison to the examination-in-chief of Prosecution witnesses, the Defence enjoyed a disproportionate amount of time for cross-examination.<sup>11</sup>

12. Statements made at meetings open to the public, or at roadblocks, are capable of qualifying as direct and public incitement to commit genocide. Both the indictment and witness testimony allege that Ngirabatware acted in public when he directly incited persons to commit genocide.<sup>12</sup>

13. A review of the evidence shows it to be sufficient to sustain a conviction on each of the six counts of the Indictment.<sup>13</sup>

<sup>7</sup> Response, paras. 5, 17, 20, 57, 69, 72-73, 76, 81, 91, 93, 101, 107.

<sup>8</sup> *Id.*, paras. 10-11, notes 11-15. The description of these Indictment paragraphs comes from the Prosecution Response.

<sup>9</sup> The Chamber notes that paragraph 18 of the Response appears to argue "that it will be possible" for Counts 2 and 3 to be considered paragraph by paragraph *Id.*, para. 18. In light of the context and the next paragraph of the Response, the Chamber considers this to be a typographical error, and interprets the sentence to claim "that it will be [im]possible" to do so.

<sup>10</sup> *Id.*, paras. 7-10, 18-19, 54-56, 71-72, 77.

<sup>11</sup> *Id.*, para. 14.

<sup>12</sup> *Id.*, paras. 58-59, 64-68.

<sup>13</sup> *Id.*, paras. 12-17 (addressing Count 1, and incorporating paragraphs 21 through 32, and 41 through 53 of the Response), 18-56 (focusing on Counts 2 and 3), 57-75 (discussing Count 4, and incorporating submissions pertaining to Counts 1 and 2), 76-91 (presenting submissions on Count 5, and on Ngirabatware's alleged participation in a joint criminal enterprise), 92-107 (concerning Count 6).

**Defence Reply**

14. In addition to the relief sought in its Motion, the Defence prays the Chamber to grant the Prosecution request to withdraw 15 paragraphs of the Indictment, located at paragraph 11 of the Prosecution Response. The Defence also asks the Chamber to disregard the Prosecution Response because of its late filing.<sup>14</sup>

15. The Chamber should consider the Indictment paragraphs on an individual basis, and must acquit Ngirabatware of the contested paragraphs due to insufficient evidence.<sup>15</sup> As for the charges of crimes against humanity, the Defence contends that the Prosecution has led no evidence of a widespread and systematic attack on the civilian population, or of Ngirabatware's awareness that his alleged acts formed part of such an attack.<sup>16</sup>

16. In light of the Prosecution's withdrawal of the allegations in paragraphs 37 and 58, the Chamber should also strike the very similar allegations in paragraphs 60 and 33, respectively. Furthermore, if the Chamber acquits Ngirabatware on the Count 1, then it must also acquit him on the same events described in paragraphs 32, 34 through 36, 56, 57 and 59.<sup>17</sup>

17. The Defence claims that where the evidence bears no resemblance to that anticipated by the Prosecution's Pre-Trial Brief, then the Prosecution case should be deemed to have broken down. This lack of notice threatens the right to a fair trial. In such circumstances, the Chamber should acquit, and to do otherwise would amount to an impermissible amendment of the Indictment.<sup>18</sup>

**DELIBERATIONS**

18. As a preliminary matter, the Chamber addresses the Defence contention that the Prosecution filed its Response after the deadline. The Defence filed its Motion on 7 September 2010 and, the following day, the Chamber provided seven days for the filing of any Response and any Reply. The Prosecution filed its Response on 15 September 2010.<sup>19</sup> It appears that the Defence did not receive this Response until 16 September 2010,<sup>20</sup> and the Defence filed its Reply seven days after that date. The Chamber considers both Parties to have complied with the filing deadlines, and has taken into account both the Prosecution Response and the Defence Reply.

<sup>14</sup> Reply, paras. 3-11, 28, 33, 52, 65, 88, 128, 147.

<sup>15</sup> *Id.*, paras. 13, 16-22, 23-27 (focusing on Count 1), 40-41 (Counts 2 and 3), 42-62 (addressing Count 4, and contending that there is insufficient evidence to satisfy the "public" component of the charge), 63-80 (concentrating on Count 5), 81-85 (Count 6), 86-95 (Count 1), 96-118 (Counts 2 and 3), 119-121 (relating to Count 4), 122-128 (making submissions on Count 5), 129-146 (Count 6, and disputing that sufficient evidence has been led to hold Ngirabatware accountable for alleged rapes based on his alleged role in a joint criminal enterprise).

<sup>16</sup> *Id.*, paras. 75, 77.

<sup>17</sup> *Id.*, paras. 27, 30-33.

<sup>18</sup> *Id.*, paras. 16, 23-26, 35-39, 59-62, 80, 92-95, 115, 119-121.

<sup>19</sup> The timestamp indicates that the Prosecution filed its Response at 9.46 p.m. See Response, p. 1.

<sup>20</sup> The Chamber accepts the Defence's statement that it received the Response at 9.51 a.m. on 16 September 2010. See Reply, para. 9.

***Prosecution Withdrawal of Certain Allegations***

19. The Prosecution seeks the Chamber's permission to withdraw five general allegations that span 15 paragraphs of the Indictment.<sup>21</sup> The Chamber considers it clear that the Prosecution seeks to withdraw the paragraphs as a whole.

20. The Chamber grants the Prosecution request to withdraw paragraphs 10 through 12, 15, 31, 32, 34, 37, 38, 47, 54, and 56 through 59 of the Indictment, and declares that the Defence has no case to answer in respect of these paragraphs.

21. As for the Defence position that the withdrawal of paragraphs 37 and 58 should entail the removal of similar paragraphs 60 and 33, respectively,<sup>22</sup> the Chamber considers that this would not be appropriate under the circumstances. These latter paragraphs relate to different counts of the Indictment, and the Prosecution has made no request for their withdrawal. Moreover, no reason has been advanced that would warrant the removal of these paragraphs. The Chamber denies the Defence submissions in this regard.

***Rule 98bis***

22. Rule 98bis 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, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

23. According to the Appeals Chamber:<sup>23</sup>

[T]he reference in Rule 98bis to a situation in which "the evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. . . . "[T]he test [to be] applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". . . . [T]he test is not whether the trier *would in fact arrive at a conviction* beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could.

24. Rule 98bis, as both Parties agree, does not require an evaluation of the credibility or reliability of the Prosecution evidence. But if the Prosecution's case has completely

<sup>21</sup> Response, para. 11 ("The Prosecution did not lead evidence regarding the allegations relating to [five events] and seeks the Trial Chamber's permission to withdraw them."), notes 11-15.

<sup>22</sup> Reply, paras. 30-32.

<sup>23</sup> *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement (AC), 5 July 2001 ("*Jelisić Appeals Judgement*"), para. 37, quoting *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 434. See also *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005 ("*Bagosora et al. Decision*"), para. 6 (noting that, in *Jelisić*, the Appeals Chamber was interpreting a provision of the ICTY Rules that was "substantially identical" to the Rules of this Tribunal).

broken down such that no case remains, the Chamber may consider that the evidence obviously lacks credibility and reliability, and therefore enter a judgement of acquittal.<sup>24</sup>

25. The Chamber may find the Prosecution evidence to be sufficient to sustain a conviction and still acquit the Accused at the end of trial, even if the Defence adduces no additional evidence.<sup>25</sup>

26. To the extent that the Defence raises issues pertaining to notice, the Chamber will not entertain them in addressing the sufficiency of the evidence pursuant to Rule 98bis.<sup>26</sup>

### **Paragraphs and Counts**

27. The Defence submits that the Chamber has the authority to acquit an Accused of individual paragraphs of the Indictment, and requests that the Chamber exercise this power.<sup>27</sup> In response, the Prosecution appears to contend that the Chamber should not adopt this approach, and should instead focus on the six counts as a whole.<sup>28</sup>

28. The Chamber observes that Rule 98bis addresses “counts charged in the indictment” and does not require a paragraph-by-paragraph analysis of the Indictment. Moreover, other Trial Chambers have exhibited a clear preference for treating counts as a whole.<sup>29</sup> This Chamber, however, is of the view that, in exceptional circumstances, where warranted and when the concerned paragraph is clearly not interdependent upon other paragraphs, it could consider adopting a paragraph-based approach.

29. In this case, the Chamber considers that focusing on the remaining paragraphs of the Indictment would entail “an unwarranted substantive evaluation of the quality of

<sup>24</sup> See, for example, *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-T, Decision on the Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 9 October 2009 (“*Kanyarukiga Decision*”), para. 9; *The Prosecutor v. Augustin Ndindiliyimana et al.*, Corrigendum to the Decision on Defence Motions Pursuant to Rule 98bis (TC), 18 June 2007 (“*Ndindiliyimana et al. Decision Corrigendum*”), para. 7. See also Motion, para. 14; Response, para. 5; Reply, para. 14.

<sup>25</sup> *Jelisić Appeals Judgement*, para. 37.

<sup>26</sup> See, for example, *Kanyarukiga Decision*, para. 10; *Ndindiliyimana et al. Decision Corrigendum*, para. 8; *Bagosora et al. Decision*, para. 7; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Acquittal Under Rule 98bis (TC), 16 December 2004, paras. 73-75.

<sup>27</sup> Motion, paras. 18-48; Reply, paras. 18-22, 67.

<sup>28</sup> See Response, paras. 7-10, 18-19, 77.

<sup>29</sup> See, for example, *Kanyarukiga Decision*, para. 14; *The Prosecutor v. Ildephonse Hategekimama*, Case No. ICTR-00-55B-T, Decision on Motion for Acquittal Pursuant to Rule 98 bis (TC), 5 June 2009, para. 13; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motions for Judgement of Acquittal (TC), 19 March 2008, paras. 3, 5; *The Prosecutor v. Simon Bikindi*, Case No. ICTR-2001-72-T, Decision on Defence Motion for Judgement of Acquittal (TC), 26 June 2007, para. 12; *Ndindiliyimana et al. Decision Corrigendum*, para. 9; *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98bis (TC), 22 May 2007, para. 5; *The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence Motion Pursuant to Rule 98 bis (TC), 21 February 2007, para. 10; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98 bis (TC), 22 November 2005, paras. 10, 12; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-R98bis, Decision on Defence Motion for Judgement of Acquittal (TC), 28 October 2005, para. 8; *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. 6.

much of the Prosecution evidence".<sup>30</sup> The Chamber declines to be drawn into such an exercise at this stage. Accordingly, the Chamber will address the counts in their entirety.

***Conspiracy to Commit Genocide (Count 1)***

30. Ngirabatware is charged with conspiracy to commit genocide, as described in paragraphs 10 through 14 of the Indictment.<sup>31</sup> The Prosecution concedes that it did not lead evidence regarding the allegations found in paragraphs 10 through 12 under Count 1,<sup>32</sup> and the Chamber has declared that the Defence has no case to answer in respect of these paragraphs. The Defence submits that the Prosecution has also not adduced sufficient evidence on paragraphs 13 and 14, and prays for an acquittal on Count 1 of the Indictment.<sup>33</sup>

31. There appear to be contentions concerning the applicability of the evidence with regards to this Count.<sup>34</sup> The Chamber does not deem it appropriate to delve into a discussion of these matters at this stage of the proceedings.

32. Recalling the law on conspiracy to commit genocide,<sup>35</sup> the Chamber finds that there is evidence which, if accepted, could satisfy a reasonable trier of fact of Ngirabatware's guilt beyond a reasonable doubt on this count. Accordingly, the Chamber denies the Defence Motion for an acquittal on Count 1 of the Indictment.

***Genocide or, alternatively, Complicity in Genocide (Counts 2 and 3)***

33. Ngirabatware is charged with genocide, or alternatively with complicity in genocide, as set forth in paragraphs 15 through 38 of the Indictment, including through the basic form of joint criminal enterprise. The Prosecution states that it did not lead evidence on the allegations found in paragraphs 15, 31, 32, 34, 37 and 38 under Counts 2 and 3,<sup>36</sup> and the Chamber has declared that the Defence has no case to answer in respect of these paragraphs. The Defence claims that there is also insufficient evidence to sustain a conviction on paragraphs 19 through 23, 25, 26, 28 through 30, 33, 35 and 36.<sup>37</sup>

34. The Defence does not appear to dispute that there is sufficient evidence that, if accepted, could satisfy a reasonable trier of fact beyond reasonable doubt of Ngirabatware's guilt on Counts 2 and 3 as a whole. Indeed, the Defence does not

<sup>30</sup> *Bagosora et al.* Decision, para. 9.

<sup>31</sup> The Indictment, through paragraph 9, also incorporates paragraphs 3 through 8 into each count. For the purposes of this Decision, the Chamber considers that paragraphs 3 through 5 describe the alleged background and duties of Ngirabatware, and that paragraphs 6 through 8 concern the *chapeau* requirements for some of the counts. Although these paragraphs are not set out in the body of this Decision, the Chamber has taken them into account.

<sup>32</sup> Response, para. 11.

<sup>33</sup> Motion, paras. 4, 52-53, 57-59, 65-69, 252-253; Reply, paras. 23-27, 89-95, 147.

<sup>34</sup> See, for example, Response, para. 14; Reply, para. 35.

<sup>35</sup> See, for example, *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007 ("*Nahimana et al.* Appeals Judgement"), para. 894.

<sup>36</sup> Response, para. 11.

<sup>37</sup> Motion, paras. 4-5, 50-52, 85-140, 155, 252-253; Reply, paras. 40, 97-118, 147.

challenge the sufficiency of the evidence led in support of various paragraphs under these Counts.<sup>38</sup>

35. The Chamber recalls the law on genocide and complicity in genocide.<sup>39</sup> Having reviewed the submissions of both Parties, as well as the evidence to date, the Chamber finds that there is sufficient evidence that, if accepted, could sustain a conviction beyond a reasonable doubt on Count 2 or on Count 3 of the Indictment. Accordingly, the Chamber denies the Defence motion as to the remaining paragraphs that it challenges under these Counts.

***Direct and Public Incitement to Commit Genocide (Count 4)***

36. Ngirabatware is charged with direct and public incitement to commit genocide, as set forth in paragraphs 39 through 49 of the Indictment. The Prosecution concedes that it led no evidence on paragraph 47 under Count 4,<sup>40</sup> and the Chamber has declared that the Defence has no case to answer in respect of this paragraph. The Defence submits that the evidence is also insufficient to sustain a conviction on paragraphs 39, 40, and 42 through 46.<sup>41</sup>

37. The Defence does not appear to dispute that there is sufficient evidence that, if accepted, could satisfy a reasonable trier of fact beyond a reasonable doubt of Ngirabatware's guilt on Count 4 as a whole. Indeed, the Defence does not challenge the sufficiency of the evidence pertaining to various paragraphs under this Count.<sup>42</sup>

38. The Defence also submits that neither meetings at a private residence, nor interactions with persons manning a roadblock, could be sufficiently "public" to permit a conviction for direct and public incitement to commit genocide.<sup>43</sup> The Chamber considers that addressing these submissions would not be appropriate at this stage of the proceedings, and declines to be drawn into such an exercise at the present moment.

39. Recalling the law on direct and public incitement to commit genocide,<sup>44</sup> the Chamber finds that there is sufficient evidence that, if accepted, could sustain a conviction beyond reasonable doubt based on this charge. So far as the Defence Motion relates to Count 4 of the Indictment for direct and public incitement to commit genocide, the Chamber denies the Motion.

<sup>38</sup>The Defence does not challenge the allegations in paragraphs 16 through 18, 24 and 27. See, for example, Motion, paras. 4, 253; Reply, para. 147. See also Motion, para. 155.

<sup>39</sup> See, for example, *Nahimana et al.* Appeals Judgement, para. 492; *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgement (TC), 17 November 2009, paras. 22-23.

<sup>40</sup> Response, para. 11.

<sup>41</sup> Motion, paras. 4-5, 52, 156-199, 205, 252-253; Reply, paras. 42-51, 53-62, 119-121, 147.

<sup>42</sup> The Defence does not challenge the allegations in paragraphs 41, and 48 through 49. See, for example, Motion, paras. 4, 253; Reply, para. 147. See also Motion, para. 205.

<sup>43</sup> Motion, paras. 5, 156, 158, 160-162, 162, 179-180, 188-189, 193-194, 198-199, 203-205, citing, *inter alia*, *Nahimana et al.* Appeals Judgement, para. 862. See also Reply, paras. 48-51, 53-55.

<sup>44</sup> See, for example, *Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Judgement (AC), 18 March 2010, para. 135.

***Crimes Against Humanity (Counts 5 and 6)***

40. Ngirabatware is charged with both extermination and rape as crimes against humanity, as set forth in paragraphs 50 through 63 of the Indictment. The Prosecution concedes that it led no evidence on paragraphs 54, and 56 through 59 under Count 5,<sup>45</sup> and the Chamber has declared that the Defence has no case to answer in respect of these paragraphs. The Defence submits that the Prosecution has also failed to adduce sufficient evidence on paragraphs 51 through 53, 55, and 60 through 63 under Counts 5 and 6.<sup>46</sup>

41. The Defence Motion does not appear to dispute the occurrence of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. Nor does it appear to address whether, if the evidence is accepted, Ngirabatware would have acted with the requisite knowledge during the relevant time period.<sup>47</sup> The Defence, however, submits in its Reply that no evidence has been led concerning such an attack, or demonstrating Ngirabatware's awareness that any alleged acts formed part of this attack.<sup>48</sup>

42. The Chamber recalls the law concerning crimes against humanity.<sup>49</sup> After reviewing the record, the Chamber finds that there is sufficient evidence that, if accepted, could satisfy a reasonable trier of fact beyond reasonable doubt on these elements of Counts 5 and 6. The Chamber will now address Counts 5 and 6 individually.

***Extermination as a Crime Against Humanity (Count 5)***

43. Ngirabatware is charged with extermination as a crime against humanity, as described in paragraphs 50 through 60 of the Indictment, including through the basic form of joint criminal enterprise. The Prosecution states that it did not lead evidence on paragraphs 54, and 56 through 59 under Count 5,<sup>50</sup> and the Chamber has declared that the Defence has no case to answer in respect of these paragraphs. The Defence submits that there is also insufficient evidence to sustain a conviction on paragraphs 51 through 53, 55 and 60.<sup>51</sup>

44. Extermination is the act of killing on a large scale. The *actus reus* consists of any act, omission or combination thereof which contributes directly or indirectly to the killing of a large number of individuals. The *mens rea* of extermination requires that the Accused intend to kill persons on a massive scale or to subject a large number of people

<sup>45</sup> Response, para. 11.

<sup>46</sup> Motion, paras. 4, 52, 206-220, 225-253; Reply, paras. 30-32, 69, 75, 77-79, 83-85, 122-125, 127-134, 136-147.

<sup>47</sup> See generally Motion.

<sup>48</sup> Reply, paras. 75, 77-79.

<sup>49</sup> See, for example, *Nahimana et al.* Appeals Judgement, paras. 916-922, 924.

<sup>50</sup> Response, para. 11.

<sup>51</sup> Motion, paras. 4, 206-220, 225-235, 252-253; Reply, paras. 69, 75, 77-79, 122-125, 127-128, 147.

to conditions of living that would lead to their death in a widespread or systematic manner.<sup>52</sup>

45. The Defence submits that, because extermination is the act of killing on a large scale, it would be impossible to convict Ngirabatware for this crime based on one paragraph of the Indictment.<sup>53</sup> It is the Chamber's view that extermination relates to the killing of a large number of individuals, not to the evidence on a large number of Indictment paragraphs.

46. The Chamber finds, after reviewing the record, that there is evidence which, if accepted, could satisfy a reasonable trier of fact of Ngirabatware's guilt beyond a reasonable doubt as to Count 5 of the Indictment. Accordingly, the Chamber dismisses the Defence Motion in this regard.

#### ***Rape as a Crime Against Humanity (Count 6)***

47. Ngirabatware is charged with rape as a crime against humanity, as set forth in paragraphs 61 through 63 of the Indictment, pursuant to the extended form of joint criminal enterprise. The Prosecution has not made any concessions on these paragraphs.<sup>54</sup> The Defence contends that the evidence is insufficient to sustain a conviction on any of these paragraphs, and prays for an acquittal on Count 6 of the Indictment.<sup>55</sup>

48. According to settled jurisprudence, the required *actus reus* for each form of joint criminal enterprise comprises three elements. First, a plurality of persons is required. Second, there must be a common purpose which amounts to or involves the commission of a crime provided for in the Statute. Third, the participation of the Accused in the common purpose is necessary. As for the *mens rea* under the extended form of joint criminal enterprise, an Accused can only be held responsible for a crime outside of the common purpose if, under the circumstances of the case, it was foreseeable that such a crime might be perpetrated by one or other members of the group, and the Accused willingly took that risk.<sup>56</sup>

49. The Chamber considers that the record contains sufficient evidence that, if accepted, could reasonably establish Ngirabatware's alleged participation in a joint criminal enterprise. Furthermore, in light of the evidence that the rape of Tutsi females occurred shortly after the death of President Habyarimana, the Chamber concludes that a

<sup>52</sup> See, for example, *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008, para. 189; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement (AC), 22 March 2006, paras. 259-260; *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, paras. 516, 522. See also *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence (TC), 18 December 2008, para. 2191.

<sup>53</sup> Motion, paras. 207, 235; Reply, para. 64.

<sup>54</sup> See Response, para. 11.

<sup>55</sup> Motion, paras. 4, 52, 236-253; Reply, paras. 81-85, 129-134, 136-147.

<sup>56</sup> See, for example, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement (AC), 3 April 2007, paras. 364-365. See also *The Prosecutor v. Hormisdas Nsengimana*, Case No. ICTR-01-69-T, Judgement (TC), 17 November 2009, paras. 802-803.

11



reasonable trier of fact could be satisfied beyond a reasonable doubt that the rapes alleged under Count 6 would have been foreseeable to any member of the alleged joint criminal enterprise, and that all such members would have willingly taken this risk.

50. In light of the above, and recalling the law on rape as a crime against humanity,<sup>57</sup> the Chamber finds that the Prosecution has adduced sufficient evidence which, if accepted, could lead a reasonable trier of fact to find that guilt has been proven beyond a reasonable doubt as to Count 6 of the Indictment. Accordingly, the Defence Motion is denied in this respect.

**FOR THE ABOVE REASONS, THE CHAMBER**

**DENIES** the Motion;

**GRANTS** the Prosecution request to withdraw paragraphs 10 through 12, 15, 31, 32, 34, 37, 38, 47, 54, and 56 through 59 of the Indictment;

**DECLARES** that the Defence has no case to answer in respect of these paragraphs; and

**DIRECTS** the Registry to translate this Decision into French.

Arusha, 14 October 2010



William H. Sekule  
Presiding Judge



Solomy Batunguli Bossa  
Judge



[Seal of the Tribunal]



Mparany Rajohnson  
Judge

<sup>57</sup> See, for example, *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, paras. 151-157.