

# PETER ROBINSON.com: Pre-Trial Brief, Nzirorera - ICTR:

THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR RWANDA

CASE No. ICTR-98-44-PT

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding  
Judge Emile Short  
Judge G. Gustave Kam

Registrar: Mr. Adama Dieng

Date Filed: 13 July 2005

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JOSEPH NZIRORERA'S

PRE-TRIAL BRIEF

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The Office of the Prosecutor:

Mr. Don Webster

Mr. Gregory Lombardi

Mr. Iain Morley

Defence Counsel:

Mr. Peter Robinson

Counsel for Co-Accused:

Ms. Dior Diagne and Mr. Felix Sow for Edouard Karemera

Mr. Frederick Weyl for Mathieu Ngirumpatse

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## I. INTRODUCTION

1. Joseph Nzirorera respectfully submits this Pre-Trial brief, pursuant to Rule 73 *bis* (F), to assist the Trial Chamber in its understanding of the issues in this case. Rule 73 *bis* (F) provides:

“At the Pre-Trial Conference, the Trial Chamber or the designated Judge may order the defence to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set for trial.”

2. There are no admitted facts in this case. Mr. Nzirorera intends to put the prosecution to its proof as to all elements of each offence charged in the indictment.

3. At the commencement of this trial, Mr. Nzirorera is presumed innocent. The burden of proof is on the prosecution to prove his guilt beyond a reasonable doubt.<sup>[1]</sup> Nothing contained in this Pre-Trial Brief is intended to relieve the prosecution of this burden as to any issue in this case.

4. In fact, the evidence at trial will show that Joseph Nzirorera never planned, instigated, ordered, committed or otherwise aided and abetted any crime. The evidence will show that he never had effective control such as to make him responsible for the crimes committed by others during the tragic events in Rwanda.

5. At the conclusion of the prosecution's case, Mr. Nzirorera will submit a detailed motion for judgement of acquittal pursuant to Rule 98 *bis*. Should he be required to answer the

prosecution's case, Mr. Nzirorera will mount a vigorous defence to these unfounded charges. At the conclusion of all of the evidence, Mr. Nzirorera will submit a comprehensive final brief pursuant to Rule 86(B), and will ask that he be found not guilty as to all charges.

## II. COMMENCEMENT AND DURATION OF TRIAL

6. Trial of this case is presently scheduled to commence on 5 September 2005. In light of the recently-disclosed decision of the prosecution to add 143 new witnesses, as well as the fact that disclosure as to both new and existing witnesses is not complete, Mr. Nzirorera will not have adequate time and facilities to commence the trial as scheduled. In *Joseph Nzirorera's Motion to Continue Trial*, filed contemporaneously with this brief, he sets out his position on this issue in detail and requests that commencement of the trial be postponed.

7. This pretrial brief is being filed without the benefit of a ruling on the preliminary motions concerning the form and substance of the amended indictment. Should the content of the amended indictment change as a result of decisions made by the Trial Chamber or Appeals Chamber on those motions, Mr. Nzirorera reserves his right to file a supplement to this pretrial brief as well as to modify the *Notice of Alibi* also being filed contemporaneously with this brief.

8. Mr. Nzirorera estimates that the trial of this case will last for approximately 3 years. He bases this estimate on the prosecutor's witness list, the duration of the prosecutor's case in the *Bizimungu* trial, and the fact that he intends to mount a comprehensive defence case lasting at least as long as the case-in-chief of the prosecution.

9. Mr. Nzirorera would not likely consent to the substitution of a judge pursuant to Rule 15 *bis* should one of the judges of the Trial Chamber be unable to continue. Therefore he urges

that the Trial Chamber in this case be comprised of judges whose terms of office and individual circumstances make it likely they can serve for the duration of the trial.

### III. ELEMENTS OF THE OFFENCES

10. The indictment charges Mr. Nzirorera in seven counts as follows:[\[2\]](#)

Count One: Conspiracy to Commit Genocide

Count Two: Incitement to Genocide

Count Three: Genocide

Count Four: Complicity in Genocide

Count Five: Rape, as a Crime Against Humanity

Count Six: Extermination, as a Crime Against Humanity

Count Seven: Killing and Violence, as a War Crime

11. The prior decisions of this Tribunal, as well as those of the ICTY, have set forth certain required elements which the prosecution must prove beyond a reasonable doubt to sustain a conviction for each of these crimes. Those elements are cumulative. Should the prosecution fail to prove any one required element of a crime beyond a reasonable doubt, Mr. Nzirorera must be acquitted of that crime.

#### A. GENOCIDE

12. Article 2(2) provides:

“Genocide means any of the following acts committed  
with intent to destroy, in whole or in part, a national,

ethnic, 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.

13. Count 3 of the indictment provides in pertinent part:

“The Prosecutor charges **Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA** with **Genocide** pursuant to Articles 2, 6(1) and 6(3) of the Statute of the Tribunal in that during the period 1 January – 17 July 1994 *all named accused* were responsible for killing or causing serious bodily or mental harm to members of the Tutsi population, or deliberately inflicting conditions of life upon the Tutsi population that were calculated to bring about its

physical destruction, with the intent to destroy, in whole or in part, the Tutsi racial or ethnic group.”

14. The elements of the crime of genocide, applicable to this case, are:[\[3\]](#)

(1) the *actus reus* of:

(a) killing Tutsis; or

(b) causing serious bodily or mental harm to Tutsis; and

(2) the *mens rea* of:

(a) committing the act of the basis of the victim’s being a Tutsi; and

(b) intending to destroy the Tutsis as a group in whole or in part.[\[4\]](#)

15. The *actus reus* of “killing” or “*meutre*” requires intentional murder, not forms of homicide resulting from gross negligence or recklessness, or those committed in the course of other crimes such as robbery.[\[5\]](#)

16. “Serious bodily harm” is harm that seriously injures the health, causes disfigurement, or causes any serious injury to the external or internal organs, or senses.[\[6\]](#) “Serious mental harm” means more than minor or temporary impairment of mental faculties.[\[7\]](#)

17. The *mens rea* of “committing the act of the basis of the victim’s being a Tutsi” stems from the words “as such” in Article 2(2). The term “as such” for genocide means that the act must be committed against an individual because the individual was a member of a specific

group and specifically because he belonged to the group, so that the victim is the group itself, not merely the individual.[\[8\]](#)

18. Therefore not all killings of Tutsi or assaults on Tutsi resulting in serious bodily or mental harm are genocide. Those killings or assaults committed for personal reasons, such as revenge, financial gain, or family disputes would not qualify, because they were not committed because of the victim's status as a Tutsi. No would killings of persons reasonably believed to be combatants or agents of the armed forces, such as the Rwandan Patriotic Army (RPA), constitute genocide.

19. The *mens rea* of "intending to destroy the Tutsis as a group in whole or in part" has been referred to as the requirement of "special intent" or "*dolus specialis*". This imposes a very high burden on the prosecution to prove that the perpetrator acted with the specific intention of bringing about the destruction of the entire ethnical group or a substantial part.[\[9\]](#)

20. Direct evidence of intent to commit genocide would be utterances pronounced or documents written by the perpetrator. The intent of the perpetrator should be determined, above all, from his words and deeds.[\[10\]](#)

21. Whether a determination of genocidal intent of a perpetrator can be based upon the general context of the perpetration of crimes, given the stringent requirements of *dolus specialis*, is an open question in the Tribunals.[\[11\]](#) In the ICTY, one Trial Chamber held:

“While the general and widespread nature of the atrocities committed may be evidence of a plan of persecution in the circumstances of this case, it is not sufficient to satisfy

the specific intent required for genocide.”[\[12\]](#)

22. The defence contends that it is wrong to infer genocidal intent from the fact that a perpetrator participates in the context of a wave of killings, and that making such an inference vitiates the requirement of proving the specific intent of the individual perpetrator required by Article 2.

23. The *mens rea* requirements include the intent to destroy the Tutsis “in whole or in part”. The intention to destroy “in part” requires an intent to at least destroy a substantial part of the group.[\[13\]](#)

24. The identification of the “group” is to be made by reference to both the *objective* particulars of a given social and historical context, and by the *subjective* perceptions of the perpetrators.[\[14\]](#) Various Trial Chambers have found, or taken judicial notice, that the Tutsi are an ethnical group within the meaning of Article 2.[\[15\]](#)

## B. CONSPIRACY

25. Article 2(3) of the Statute provides:

“The following acts shall be punishable:

- a) Genocide;
- b) Conspiracy to commit genocide;
- c) Direct and public incitement to commit genocide;
- d) Attempt to commit genocide;
- e) Complicity in genocide

26. Count 1 of the indictment provides:

“The Prosecutor charges **Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA** with **Conspiracy to Commit Genocide** pursuant to Articles 2 and 6(1) of the Statute of the Tribunal in that over a period of at least one year leading up to and including 6 April – 17 July 1994 *all named accused*, conspired together, and with others, to destroy in whole or in part, the Tutsi racial or ethnic group.”

27. The elements of conspiracy to commit genocide are:

- (1) the accused agreed between themselves and others to kill or cause serious bodily or mental harm to members of the Tutsi group; and
- (2) the killing or serious harm contemplated by the agreement was with the intent to destroy, in whole or in part, the Tutsi group, as such.[\[16\]](#)

28. The *actus reus* of conspiracy to commit genocide, prescribed as an offence under Article 2 (3)(b) of the Statute, is, accordingly, the act of entering into an agreement whose common object is to commit genocide; the *mens rea* is the intent to enter into such an agreement.[\[17\]](#)

29. There must be direct evidence of the agreement to commit genocide. Evidence that shows that the accused acted in concert with others is insufficient to establish a conspiracy. On

that basis, acquittals were entered at the close of the prosecution's case in two separate cases at the ICTR.[\[18\]](#)

### C. COMPLICITY

30. Article 2(3)(e) of the Statute prohibits “complicity in genocide”.

31. Count 4 of the indictment provides that:

“The Prosecutor charges **Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA** with **Complicity in Genocide** pursuant to Articles 2 and 6(1) of the Statute of the Tribunal in that during the period 1 January – 17 July 1994 *all named accused* instigated or provided the means to other persons to kill or cause serious bodily or mental harm to members of the Tutsi population, or to deliberately inflict conditions of life upon the Tutsi population that were calculated to bring about its physical destruction, knowing that those other persons intended to destroy, in whole or in part, the Tutsi racial or ethnic group.”

32. The elements of complicity in genocide are:

- (1) the accused provided practical assistance or facilitated the perpetrator to commit genocide;
- (2) the act of the accused contributed substantially to the commission of the crime of genocide;

(3) the accused provided such assistance or encouragement with the intent to destroy, in whole or in part, the Tutsi ethnic or racial group as such.[\[19\]](#)

33. The crime of complicity in genocide is similar to aiding and abetting.[\[20\]](#) When an accused is charged with both genocide and complicity, as in this case, the Trial Chamber should treat all forms of aiding and abetting under the complicity count and restrict the genocide count to direct criminal participation.[\[21\]](#)

34. Complicity, or aiding and abetting, encompasses all acts of assistance that lend encouragement or support to the commission of a crime. The assistance may be provided before or during the commission of the crime. The accused need not be present at the time of the criminal act[\[22\]](#), but, on the other hand, the mere presence of the accused at the scene of a crime does not constitute complicity.[\[23\]](#) Whatever the acts of the accused, they must contribute substantially to the commission of the crime.

35. The perpetrator of the crime must act with the specific intent to destroy the Tutsis in whole or in part, as such. The requisite *mens rea* for aiding and abetting genocide is the accomplice's knowledge of the genocidal intent of the principal perpetrators. Aiding and abetting genocide is a mode of criminal participation which does not require the accused share the specific intent of the perpetrator.[\[24\]](#)

#### D. INCITEMENT

36. Article 2(3)(c) of the Statute prohibits “direct and public incitement to commit genocide”.

37. Count 2 of the indictment provides:

“The Prosecutor charges **Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA** with **Direct and Public Incitement to Commit Genocide** pursuant to Articles 2, 6(1) and 6(3) of the Statute of the Tribunal in that during the period 1 January – 17 July 1994 *all named accused*, directly and publicly incited other persons to destroy in whole or in part, the Tutsi racial or ethnic group.”

38. The elements of incitement to commit genocide are:

- (1) The accused spoke aloud direct and public words urging others to kill or cause serious bodily or mental harm to members of the Tutsi group;
- (2) the accused intended to directly prompt or provoke another to commit genocide; and
- (3) the accused and the perpetrator shared the intent to destroy, in whole or in part, the Tutsi group, as such.[\[25\]](#)

39. Direct and public incitement is directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[\[26\]](#)

40. General allegations that an accused provoked or incited others to commit genocide are insufficient to sustain a conviction for direct and public incitement to commit genocide.<sup>[27]</sup> Similarly, private encouragement to commit genocide is not sufficient—the incitement must be public.

#### E. CRIMES AGAINST HUMANITY

41. Article 3 of the Statute provides:

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

- a) Murder
- b) Extermination
- c) Enslavement
- d) Deportation
- e) Imprisonment
- f) Torture
- g) Rape
- h) Persecutions on political, racial, and religious grounds;
- i) Other humane acts.

42. The indictment charges two specific crimes against humanity: rape and extermination. Count 5 provides in pertinent part:

“The Prosecutor charges **Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA** with **Rape as a Crime Against Humanity** pursuant to Articles 3, 6(1) and 6(3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, *all named accused* were responsible for raping persons or causing persons to be raped, as part of a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds.”

43. Count 6 provides in pertinent part:

“The Prosecutor charges **Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA** with **Extermination as a Crime Against Humanity** pursuant to Articles 3, 6(1) and 6(3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, *all named accused* were responsible for killing persons, or causing persons to be killed, as part of a widespread or systematic attack against a civilian population on political, ethnic, or racial grounds.”

44. The jurisdictional elements of a crime against humanity are:

- (i) an attack;
- (ii) that was widespread or systematic;
- (iii) directed against a civilian population;
- (iv) committed on national, political, ethnical, racial, or religious grounds;
- (v) that the accused acted with knowledge of the broader context of the attack and with the knowledge that his acts formed part of the attack.[\[28\]](#)

45. The concept of “attack”, within the meaning of Article 3 of the Statute, has been defined as an unlawful act, event, or series of events of the kind listed in Article 3 (a) through (i) of the Statute.[\[29\]](#) It must be “widespread”, meaning a large scale attack, or “systematic”, meaning an attack of an organized nature.[\[30\]](#)

46. To determine if an attack was widespread or systematic, factors to be considered are:

- (1) the consequences of the attack on the targeted population;
- (2) the number of victims
- (3) the nature of the acts
- (4) the possible participation of officials or authorities; and
- (5) any identifiable patterns of crimes[\[31\]](#)

47. The attack must be directed against the civilian “population” rather than against a limited and randomly selected number of individuals. The civilian population must be the primary object of the attack.[\[32\]](#) In order to determine whether an attack was directed against the civilian population, the following factors are considered:

- (1) the means and method used in the course of the attack;
- (2) the status of the victims;
- (3) their number;
- (4) the discriminatory nature of the attack;
- (5) the nature of the crimes committed in its course;
- (6) the resistance to the assailants at the time; and
- (7) the extent to which the attacking force may have complied with precautions.[\[33\]](#)

48. The burden of proof as to whether a person is a civilian rests with the prosecution.[\[34\]](#)

49. There must be a nexus between the act of rape or extermination and the attack. Although the act need not be committed at the same time and place as the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.[\[35\]](#) An act would be considered “isolated” when it is so far removed from the attack that it cannot reasonably be said to have been part of the attack.[\[36\]](#)

50. The attack must be committed on “political, ethnical, or racial” grounds.[\[37\]](#) Acts committed against persons outside of the discriminatory categories may only be considered part of the attack if it furthers or supports the attack on the group discriminated against.[\[38\]](#)

51. The perpetrator of the act of extermination or rape must know that his act is part of a widespread or systematic attack on the civilian population.[\[39\]](#)

52. In addition to the common elements required to prove an act is a crime against humanity, the prosecution must also prove the elements of the act itself.

(1) RAPE

53. The elements of rape are:

- (1) the nonconsensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
- (2) the intention to effect the prohibited sexual penetration with the knowledge that it is without the consent of the victim.[\[40\]](#)

54. Count 5 of the indictment provides no specifics as to the identity of the victims, the identity of the perpetrators, or the dates or locations of the alleged rapes. Absent such information, Count 5 contains insufficient information for notice to the accused as to what he has to defend, and cannot support a conviction.[\[41\]](#)

55. The prosecution's attempt to hold Mr. Nzirorera liable for rape in Rwanda, in general, on the grounds that although he never committed or ordered rapes, they were foreseeable to him, is a novel theory of liability being tested for the first time at this Tribunal. Mr. Nzirorera will be able to address this in more detail after he has had an opportunity to investigate the facts.

(2) EXTERMINATION

56. The elements of extermination are:

- (1) any act or combination of acts which contributes to the killing of a large number of individuals;
- (2) with the intent to kill or inflict grievous bodily harm or serious injury likely to cause death
- (3) knowing that the action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing.[\[42\]](#)

57. The crime of extermination is the act of killing on a large scale.[\[43\]](#) It is directed against a population rather than against individuals.[\[44\]](#) The elements of extermination are: a) act or omission that results in the death of persons on a massive scale, and b) the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to the death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons.[\[45\]](#)

58. The *actus reus* of extermination is killing that constitutes or is part of a mass killing of members of a civilian population. The scale of the killing required for extermination must be substantial. Responsibility for a single killing or limited number of killings is insufficient to support a conviction for extermination.[\[46\]](#)

59. The *mens rea* for extermination is the intent to perpetrate or participate in a mass killing.[\[47\]](#) Recklessness or gross negligence is insufficient to support a conviction for extermination.[\[48\]](#)

60. Extermination is a crime which by its very nature is directed against a group of individuals. It differs from murder because it requires an element of mass destruction. The acts must contribute to the killing of a large number of individuals.[\[49\]](#)

#### F. WAR CRIMES

61. Article 4 of the Statute provides:

“The International Criminal Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- h) Threats to commit any of the foregoing acts.”

62. Count 7 of the indictment charges that:

“The Prosecutor charges **Édouard KAREMERA, Mathieu NGIRUMPATSE, and Joseph NZIRORERA** with **Killing and Causing Violence to Health and Physical or Mental Well-Being** as a Serious Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II pursuant to Articles 4, 6(1) and 6(3) of the Statute of the Tribunal in that on or between the dates of 6 April and 17 July 1994, throughout the territory of Rwanda, *all named accused* were responsible for killing, 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.”

63. As a threshold, the Prosecutor must prove the following elements of this form of War Crime:

- (1) that an armed internal conflict existed on the territory of Rwanda;

- (2) that the victims were not taking part in the hostilities at the time of the alleged violation; and
- (3) that a nexus existed between the accused's alleged crimes and the armed internal conflict.[\[50\]](#)

64. If these threshold elements are met, the Prosecution must then prove the following elements for the specific violation of Article 4 alleged in the indictment:

- (1) the *actus reus* of committing acts of violence to life, health, and physical or mental well-being[\[51\]](#)
- (2) the *mens rea* applicable to the particular crime committed, such as murder, assault, rape, or treating in a cruel manner.[\[52\]](#)

65. An ICTY Trial Chamber has held that the crime listed in Common Article 3(a)—“violence to life, health and physical or mental well-being of persons”—did not exist under customary international law and cannot form the basis of a conviction.[\[53\]](#) Therefore, Mr. Nzirorera contends that he should be acquitted of Count 7 on that basis alone. This is a subject of a pending preliminary motion, and, if denied, will be a subject of his Rule 98 *bis* motion at the conclusion of the prosecution's case.

66. Mr. Nzirorera also contends that Count 7 fails to charge a crime under Common Article 3 in that the Article prohibits “murder” and the amendment charges “killing”, which can include negligent or other non-intentional deaths.

67. There must be the existence of an “armed conflict” to trigger Article 4. An “armed conflict” is said to exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.[\[54\]](#)

68. Whether a conflict is internal or international is determined according to the evidence presented in each individual case.[\[55\]](#) The applicable criteria for determining the nature of the conflict is the “overall control” test set forth in *Prosecutor v Tadic*, No. IT 94-1-A (15 July 1999) at para. 137. Mr. Nzirorera contends that the war in Rwanda was international in character and that this element of Count 7 will not be proved by the prosecution.[\[56\]](#)

69. Article 4 applies to persons not taking part in the hostilities. This would exclude the armed forces of the Rwandan Patriotic Army and their agents who infiltrated Rwanda on their behalf. Persons who engage in acts of war that strike at personnel or equipment of the enemy armed forces are not protected by Article 4.[\[57\]](#)

70. There is no limitation on the class of persons who may violate Article 4. The Appeals Chamber reversed a holding of the Trial Chamber in *Prosecutor v Akayesu* that the perpetrator of a crime under Article 4 must be a public agent.[\[58\]](#)

71. The “nexus” between the act and the armed conflict has been a difficult element in the jurisprudence of the ICTR. The purpose of common Article 3 is to protect people as victims of internal armed conflicts, not to protect people against crimes unrelated to the conflict, however reprehensible such crimes may be. Therefore, there must be a close relationship between the crime and the armed conflict.[\[59\]](#)

72. The existence of the armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the offence, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed.<sup>[60]</sup>

73. Factors to be considered in determining the nexus of the act to the armed conflict include (1) whether the perpetrator is a combatant; (2) whether the victim is a non-combatant; (3) whether the victim is a member of the opposing party; (4) whether the act can be said to serve the ultimate goal of the military campaign; (5) and whether the crime was committed as part of the perpetrator's official duties.<sup>[61]</sup>

74. The required nexus has not been found to have existed in several ICTR trials.<sup>[62]</sup> However, the decision of the Appeals Chamber in *Prosecutor v Rutaganda*<sup>[63]</sup> reversed one such finding. Nevertheless, particular care is needed when the accused, such as Mr. Nzirorera, is a non-combatant.<sup>[64]</sup>

#### IV. FORMS OF LIABILITY

75. Article 6(1) of the Statute provides:

“A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in Articles 2 to 4 of the present Statute shall be individually responsible for the crime.”

76. Article 6(3) provides:

“The fact that any of the acts referred to in articles 2 to 4 of the present Statute 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.”

77. The indictment charges the accused under both forms of liability.

A. INDIVIDUAL CRIMINAL RESPONSIBILITY

78. Criminal responsibility for crimes other than genocide requires that the offence actually be consummated.<sup>[65]</sup> In order for an individual to be held responsible for a crime under Articles 2 to 4 of the Statute, he must have participated in such a way so as to substantially contribute to the completion of the crime.<sup>[66]</sup> There must also exist a clear awareness on the part of the accused that his participation will lead to the commission of a crime.<sup>[67]</sup>

79. The indictment does not specify which form of individual criminal responsibility the accused are charged with—planning, instigating, ordering, committing, or otherwise aiding and abetting. This does not provide the accused with adequate notice of the crime he must defend against.<sup>[68]</sup> Mr. Nzirorera will move for a judgement of acquittal on this ground pursuant to Rule 98 *bis* at the conclusion of the prosecution case.

80. “Planning” envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime. The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.[\[69\]](#)

81. “Instigating” refers to urging, encouraging, or prompting another person to commit a crime. Proof is required of a causal connection between the instigation and the commission of the crime.[\[70\]](#)

82. “Ordering” refers to a situation where an individual has a position of authority to order and thus can compel another individual who is subject to that authority to commit a crime. Individual criminal responsibility for “ordering” requires the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it, although this relationship may be temporary or informal.[\[71\]](#)

83. In the absence of a hierarchical relationship between the accused and the perpetrator, it is difficult to establish that the words of the accused amounted to, or were perceived as, an order.[\[72\]](#)

84. “Committing” refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime.[\[73\]](#)

85. “Otherwise aiding and abetting” means assisting or encouraging another to commit a crime.[\[74\]](#) Aiding means assisting or helping another to commit a crime. Abetting means facilitating, advising, or instigating the commission of a crime.[\[75\]](#) The act of aiding and

abetting must contribute substantially to the commission of the crime.<sup>[76]</sup> It remains unsettled whether aiding and abetting can be committed by omission.<sup>[77]</sup>

86. To be guilty of aiding and abetting, one must act intentionally and with the awareness that he is influencing the principal perpetrator to commit the crime.<sup>[78]</sup> The aider and abettor must also be aware of the “essential elements” of the crime committed by the principal offender, including the state of mind of the principal offender.<sup>[79]</sup>

## B. JOINT CRIMINAL ENTERPRISE

87. The Appeals Chamber has held that one way an offence can be “committed” under Article 6(1) of the Statute is under a theory of “joint criminal enterprise”.<sup>[80]</sup> There are three forms of joint criminal enterprise: basic, systemic, and extended.<sup>[81]</sup> Only the first and third categories are charged in the Amended Indictment.

88. The “basic” form of joint criminal enterprise is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.<sup>[82]</sup>

89. The “extended” form of joint criminal enterprise concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.<sup>[83]</sup>

90. The elements of the *actus reus* of joint criminal enterprise liability are the same for both categories. They are:

- (1) a plurality of persons.
- (2) the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute; and
- (3) the participation of the accused in the common purpose which involves the perpetration of one of the crimes provided for in the Statute.[\[84\]](#)

91. The *mens rea* of joint criminal enterprise liability differs between the basic and extended forms. For the first category, a shared intent to perpetrate a certain crime is required on the part of all co-perpetrators. For the third category, the accused must have the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or to the commission of a crime by the group.

92. Under the third category, a person may be held responsible for a crime other than the one agreed upon in the common plan arises if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.

93. There is currently a split of authority in both Tribunal and national jurisprudence over whether foreseeability should be evaluated on an objective (“should have reasonably foreseen”) or subjective (“did, in fact, foresee”) standard.

94. Mr. Nzirorera contends that the joint criminal enterprise doctrine applies to smaller enterprises than the vast, nationwide enterprise alleged in this case. This is the subject of a preliminary motion which has not yet been decided by the Trial Chamber.

95. Mr. Nzirorera also contends that it is a requirement of the joint criminal enterprise doctrine that the contribution of the accused to the enterprise be significant. While the Appeals Chamber has declined to impose this as a blanket requirement in category two joint criminal enterprise cases,<sup>[85]</sup> such a requirement is necessary when a vast category one and three enterprise is alleged to avoid guilt by association.

96. Mr. Nzirorera also contends that this Trial Chamber should follow the decision of the Trial Chamber in *Brdjanin* that the physical perpetrator must be a member of the joint criminal enterprise and that there must be an agreement directly between the accused and the physical perpetrator in order for the accused to be held responsible for that person's crimes.<sup>[86]</sup> These issues are currently the subject of the prosecution's appeal in *Brdjanin* and should be resolved before the end of Mr. Nzirorera's trial.

### C. SUPERIOR RESPONSIBILITY

98. The elements of superior responsibility under Article 6(3) are:

- (1) the existence of a superior-subordinate relationship
- (2) the superior's knowledge or reason to know that the criminal act was about to be or had been committed; and
- (3) the superior's failure to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator.<sup>[87]</sup>

99. A superior-subordinate relationship requires a formal or informal hierarchical relationship where a superior is senior to a subordinate.<sup>[88]</sup> The test is one of “effective control”—meaning that the superior has, by virtue of *de jure* or *de facto* authority, the material ability to prevent the commission of the offence or to punish the principal offenders.<sup>[89]</sup>

100. The fact that an accused is a person of great influence is not sufficient to establish the element of “effective control”.<sup>[90]</sup> For example, in Rwanda, the fact that a person was a Minister of the Interim Government<sup>[91]</sup>, served in the Transitional Parliament<sup>[92]</sup>, or was a former Bourgmestre<sup>[93]</sup>, has been held insufficient to establish a superior-subordinate relationship with those committing crimes.

101. It has been observed that in Rwanda in 1994, “individuals who possessed formal authority prior to the massacres found themselves devoid of any power when the killings started.”<sup>[94]</sup>

102. A leadership role of the accused in meetings is insufficient to show that he was in a superior-subordinate role with the people in attendance such that he could prevent or punish crimes committed by people in attendance at those meetings.<sup>[95]</sup>

103. It must also be shown that the perpetrator was a subordinate of the accused at the time of the commission of the offence. An accused cannot be convicted under Article 6(3) for crimes committed by a subordinate before the accused assumed command or control over the subordinate.<sup>[96]</sup> The Interahamwe have been found to have been affiliated with, but not necessarily incorporated into, the MRND party.<sup>[97]</sup> The term “Interahamwe” was found to

sometimes also refer to any person who took part in the massacres of 1994, regardless of their political party.[\[98\]](#)

104. The second prerequisite to a finding of superior responsibility is proof beyond a reasonable doubt that the accused had (1) actual knowledge or (2) possessed information providing notice of the risk that offences were being or had been committed such as to indicate the need for additional investigation to ascertain whether such offenses were about to be, were being, or had been committed by subordinates.[\[99\]](#)

105. Actual knowledge may be proven by circumstantial evidence, but cannot be inferred on the basis of the accused's position alone.[\[100\]](#) Among the circumstances that may bear upon the existence of actual knowledge are:

- (1) the number of illegal acts
- (2) the type of illegal acts
- (3) the time during which the illegal acts occurred
- (4) the number and types of troops involved
- (5) the geographical location of the acts
- (6) the widespread occurrence of the acts
- (7) the tactical tempo of operations
- (8) the modus operandi of similar illegal acts
- (9) the officers and staff involved
- (10) the location of the commander involved.[\[101\]](#)

106. The “had reason to know” standard requires that the accused, while not in possession of actual knowledge, had information available to him which put him on notice of crimes being committed by his subordinates.<sup>[102]</sup> Information about the general situation that prevailed in Rwanda is not sufficient to put a superior on notice that his subordinates might commit crimes.<sup>[103]</sup> The “had reason to know” standard is not a standard of criminal negligence<sup>[104]</sup>, nor a provision for vicarious liability.<sup>[105]</sup>

107. The third requirement of superior responsibility is that the superior failed to prevent the crime or punish the perpetrator. This requires that the superior have the “material possibility” to prevent or punish.<sup>[106]</sup> A person shown to have “substantial influence” will not incur liability as a superior absent such a material ability to prevent or punish.<sup>[107]</sup> A person is not required to perform the impossible.<sup>[108]</sup>

108. This “material possibility” to prevent or punish is particularly problematic with respect to civilians, where the duty of a subordinate to obey an order is not as firmly established as in military structures. This issue is of particular importance in this case, where the accused had no material ability to prevent or punish persons who were simply voluntary members of their political party. Unlike the military structures where a superior could initiate court martial proceedings, or civil administrative structures, where a superior could fire an employee, the accused in this case had only the ability to take away a person’s voluntary membership in the MRND party—hardly a material ability to prevent or punish crimes.

109. There is a particular issue with respect to superior responsibility under Count 7—crimes committed in an internal armed conflict. In *Prosecutor v Hadzihasanovic*, No. IT-01-47-AR73.2 (16 July 2003), the Appeals Chamber of the ICTY held that superior responsibility of

military officers in non-international armed conflicts was part of customary international law. However, it remains an open question whether superior responsibility of civilians in a non-international armed conflict was part of customary international law. This Trial Chamber will be the first to answer that question.

## V. CREDIBILITY OF WITNESSES

110. The credibility of witnesses will be a central issue in this trial and will present the most formidable challenge to the Trial Chamber in rendering its judgement. Mr. Nzirorera contends that many of the witnesses brought by the prosecution will give false testimony—purchased by the prosecution and government of Rwanda with promises of better treatment and sometimes freedom itself, and motivated by self-interest. The Appeals Chamber has held that “a witness who faces criminal charges that have not yet come to trial may have real or perceived gains to be made by incriminating accused persons and may be tempted or encouraged to do so falsely.”<sup>[109]</sup>

111. The giving of testimony at the ICTR on behalf of the prosecution has become a sort of “business” in Rwanda, with poverty-stricken or incarcerated persons volunteering or being recruited to accuse high-ranking officials, and with prison employees and other interested parties encouraging these false accusations. Given that over 100,000 people have been incarcerated in Rwanda after the events of 1994, the prosecution has a large pool of people from which it can select its witnesses.

112. What will be particularly striking about the evidence against Mr. Nzirorera is that it is not the victims who are accusing him, but the killers. Unlike most previous trials at the ICTR

where Trial Chambers have heard compelling testimony from survivors, the testimony that this Trial Chamber will hear comes from people who killed or encouraged the killing, and who are now seeking to better their situation by cooperating with the authorities and providing false testimony against Mr. Nzirorera and others. It is well established that the testimony of such witnesses must be viewed with caution.[110]

113. Therefore, the defence will mount a direct and vigorous challenge to the credibility of these witnesses. The Trial Chamber must be vigilant to ensure that its judgement is not based upon perjury and that it is not a party to the wrongful conviction of an innocent man.

114. A witness' credibility can be impeached, or called into question, in a number of ways. Among them are (1) differences between trial testimony and prior statements or testimony; (2) contradiction with the testimony of other witnesses; and (3) evidence of a motive or bias to testify falsely, such as the receipt of benefits from authorities. The Appeals Chamber recently held that:

“When assessing credibility, it is proper for the Trial Chamber to seek corroboration from other evidence, other testimonies, or comparing the witness' prior statement with his oral testimony.”[111]

115. The Appeals Chamber and various Trial Chambers have been confronted in previous trials with witnesses whose trial testimony has differed from the prior statements they have given to prosecution investigators. The Chambers have recognized that these differences may be explained by the lapse of time, the language used, the accuracy of the interpretation, and the

impact of trauma on the witness. However, where the inconsistencies cannot be so explained to the satisfaction of the Trial Chamber, the reliability of the witness' testimony may be questioned.[\[112\]](#)

116. Inconsistencies may raise doubts in relation to the particular piece of evidence in question, or, where such inconsistencies are found to be material, to the witness' evidence as a whole.[\[113\]](#) As a result, prior statements are an important tool for assessing the credibility of a witness.[\[114\]](#) The Appeals Chamber has held that "A trial chamber is bound to take into account inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence."[\[115\]](#)

117. In this case, there will be several instances where witnesses have given full accounts of the events without mentioning Mr. Nzirorera—only accusing him at a later time when it became in the witness' interest to do so. The failure to mention the accused under these circumstances should cause the Trial Chamber to seriously question the truthfulness of such testimony.[\[116\]](#)

118. The underlying assumption is that a person who truly observed an event will recount the event the same way whenever he or she testifies or makes a statement about the event. While minor inconsistencies are a natural product of human memory, a person who is fabricating testimony will often be exposed by a detailed examination of the events and comparison of the testimony with what the witness has said in the past. In short, a liar has more trouble keeping his story straight than a person who is telling the truth.

119. A witness' testimony can also be helpfully evaluated by seeing whether it is corroborated or contradicted by other evidence. For example, in *Prosecutor v Bagilishema*, No. ICTR-95-1A-A (2 July 2002), the Appeals Chamber held that it was reasonable to reject evidence that the accused was present at a stadium when there was scant corroboration for such evidence and where the evidence was contradicted by the testimony of two other witnesses.<sup>[117]</sup>

120. It is the duty of the prosecution to corroborate the testimony of its witnesses. The alleged difficulty in obtaining evidence cannot be used as an excuse to reduce the prosecution's burden of proving the guilt of the accused to one below "beyond a reasonable doubt."<sup>[118]</sup>

121. Similarly, although an accused does not have the burden of presenting any evidence or proving his innocence, evidence which contradicts the testimony of a prosecution witness is highly probative of the credibility of that witness. For example, if a witness is shown to be untruthful about his own role in the crimes, it follows that he is not a sufficiently reliable witness as to the involvement or non-involvement of other individuals.<sup>[119]</sup>

122. Another important factor in evaluating the credibility of a witness is evidence of the bias or motive of the witness in testifying. A witness can be found to be untruthful when his testimony between direct and cross-examination shifts in such a way that it appears that the witness is trying to incriminate the accused more decisively.<sup>[120]</sup> In addition, evidence of benefits received or hoped for by the witness is important when assessing the truthfulness of the witness' testimony.

123. The testimony of a witness who has or hopes to receive benefits to himself or his family for testifying must be viewed with great caution. The authorities, and not the defence, are

in a position to provide rewards for testimony, ranging from monetary payments to reduction in sentences or improvement of conditions. The incentive for witnesses' to fabricate testimony to obtain these benefits is great, and the injustice which can result from a Trial Chamber relying on such false testimony is irreparable.

124. Mr. Nzirorera will make every effort to explore the motivation of the witnesses for giving testimony, as well as the relationship between the witness and the authorities, so as to put the Trial Chamber in the best position to assess the motives and biases of these witnesses.

125. At the end of the trial, Mr. Nzirorera expects to be able to demonstrate that the testimony accusing him of crimes is unreliable and untrue. He asks for the indulgence of the Trial Chamber in allowing him the opportunity for a full and fair cross-examination of these witnesses, as well as a full and fair opportunity to obtain evidence and testimony which contradicts and calls into question the truthfulness of these accusations.

126. In *Prosecutor v Kupreskic*, No. IT-95-16-A (23 October 2001), the Appeals Chamber of the ICTY said:

“The Appeals Chamber expects a Trial Chamber to be influenced by the demeanor of the witness in assessing the credibility of his or her evidence.”[\[121\]](#)

127. Therefore, it is hoped that testimony of witnesses accusing Mr. Nzirorera of crimes can be taken in the presence of all members of the Trial Chamber. Mr. Nzirorera recognizes that proceedings can take place in the absence of a judge pursuant to Rule 15 *bis*, but respectfully requests that the Trial Chamber not convene in the absence of any of its members for testimony

of witnesses who accuse Mr. Nzirorera of crimes so that the demeanor of these witnesses may be observed by the entire Trial Chamber.

## VI. REBUTTAL EVIDENCE

128. Mr. Nzirorera wishes to point out that Trial Chambers have been loathe to extend a trial by allowing rebuttal evidence after the defence has presented its case. Rebuttal evidence is reserved for that rare case where the defence case raises a new issue which could not have reasonably been foreseen by the prosecution.<sup>[122]</sup>

129. Mr. Nzirorera plans on making a detailed opening statement and providing transparent cross-examination concerning the issues in this case. He wishes to put the prosecution on notice that he contests every element of each offence with which he is charged. The prosecution should not be surprised by any defence evidence which pertain to these matters and should bring all of its evidence in its case-in-chief. Mr. Nzirorera will object to any effort to fill the holes in the prosecution's case by so-called rebuttal evidence.

## VII. MOTIONS AND OBJECTIONS DURING TRIAL

130. Mr. Nzirorera expects to make many motions and objections during the course of the trial. The Appeals Chamber has consistently held that:

“The fact that appellant did not raise an objection before the Trial Chamber means, in the absence of exceptional circumstances, that he waived his right to raise the issue as a valid grounds of appeal.”<sup>[123]</sup>

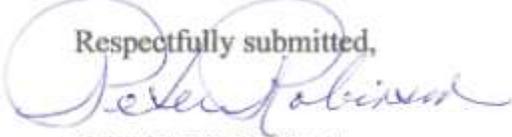
131. This rule is rooted in fairness to the Trial Chamber by requiring a party to give the Trial Chamber an opportunity to rule on a matter that is later complained of on appeal. Mr. Nzirorera is cognizant that frequent motions and objections may be bothersome to the Trial Chamber and hopes that the Trial Chamber will understand that they are necessary to a fair trial and to preserve the rights of an accused to a fair appeal.

#### VIII. THE DEFENCE

132. Mr. Nzirorera is innocent. He expects to be able to mount a vigorous defence to the charges in the indictment and to call many witnesses in his defence. He will submit a detailed summary of the evidence he intends to offer when he files a pre-defence brief after the prosecution has rested its case-in-chief.

#### IX. CONCLUSION

133. The Trial Chamber is the gatekeeper of Mr. Nzirorera's right to a fair trial. Mr. Nzirorera's defence team will do everything in its power to see that the truth comes out during his trial, that justice is done, and that the Trial Chamber's final judgement is a product of fair and skilled advocacy on the part of the defence. It is hoped that this Pre-Trial brief will be of assistance to the Trial Chamber.

Respectfully submitted,  
  
PETER ROBINSON  
Lead Counsel for Joseph Nzirorera

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[1] *Prosecutor v Musema*, No. ICTR-96-13-A, *Judgement* (16 November 2001) at para. 28

[2] References to the indictment refer to the amended indictment filed on 23 February 2005.

[3] The indictment does not charge the crimes of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intending to prevent births within the group; or forcibly transferring children of the group to another group, and therefore paragraphs (c), (d), and (e) of Article 2(2) are of no relevance to this case. *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para. 251

[4] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 312.

[5] *Prosecutor v Kayishema & Ruzindana*, No. ICTR 95-1-A , *Judgement* (1 June 2001) at para. 151

[6] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 320; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 664; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 502

[7] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 321; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 664; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 502

[8] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 53

[9] *Prosecutor v Stakic*, No. IT-97-24-T, *Judgement* (31 July 2003) at para. ; *Prosecutor v Sikirica et al*, No. IT-95-8-T (3 September 2001)

[10] Aptel, “The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda”, 13 *Criminal Law Forum* 288-89 (2002)

[11] Aptel, *supra*, at 288

[12] *Prosecutor v Sikirica et al*, No. IT-95-8-T (3 September 2001)

[13] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 316; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 514

[14] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 317

- [15] See, for example, *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 422; *Prosecutor v Kajelijeli*, No. ICTR-98-44-T, *Judgement* (16 April 2002)
- [16] *Prosecutor v Ntakirutimana*, No. ICTR 96-10-T, *Judgement* (21 February 2003) at para. 799
- [17] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motions for Judgement of Acquittal* (2 February 2005) at para. 12
- [18] *Prosecutor v Ntagerura*, No. ICTR 99-46-T, *Judgement* (13 March 2002) at paras 7-8; *Prosecutor v Kamuhanda*, No. ICTR-98-54A-T, *Judgement* (20 August 2002)
- [19] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Judgement* (21 February 2003) at para 787
- [20] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision on the Prosecutor's Request to File an Amended Indictment* (4 March 2005) at para. 19
- [21] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 394,398
- [22] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 385
- [23] *Prosecutor v Kupreskic*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 283
- [24] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 364
- [25] *Prosecutor v Niyitegeka*, No. ICTR 96-14-T, *Judgement* (16 May 2003) at para. 431; *Prosecutor v. Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 110
- [26] *Prosecutor v. Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 109
- [27] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 438
- [28] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 698
- [29] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 526
- [30] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 328
- [31] *Prosecutor v Kunarac*, No. IT-96-23-A, *Judgement* (12 June 2002) at para 95

[32] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 330

[33] *Prosecutor v Kunarac*, No. IT-96-23-A, *Judgement* (12 June 2002) at para 91

[34] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) at para 48

[35] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 326

[36] *Prosecutor v Kunarac*, No. IT-96-23-A, *Judgement* (12 June 2002) at para 100

[37] Article 3 also provides for national or religious grounds, but these are not charged in the indictment and therefore not relevant to this case.

[38] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 331

[39] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 332; *Prosecutor v Niyitegeka*, No. ICTR-96-14-T, *Judgement* (16 May 2003) at para 442

[40] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 345-46

[41] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 474

[42] *Prosecutor v Vasilejevic*, No. IT 98-32-T, *Judgement* (29 November 2002) at para 229; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.572

[43] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 516

[44] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 701

[45] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.572

[46] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 340

[47] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 341

[48] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para 341; *Prosecutor v Stacic*, No. IT-97-24-T, *Judgement* (31 July 2003) at para 642.

[49] *Prosecutor v Niyitegeka*, No. ICTR 96-14-T, *Judgement* (16 May 2003) at para. 450; *Prosecutor v Rutaganda*, No. ICTR-96-3-T, *Judgement* (6 December 1999) at para. 82

[50] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 512; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 766

[51] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Judgement* (21 February 2003) at para. 858

[52] Boed, “Individual Criminal Responsibility for Violations of Article 3, Common to the Geneva Conventions of 1949 and Additional Protocol II Thereto in the Case Law of the ICTR,” 13 *Criminal Law Forum* 320: “The specific elements of crimes against humanity are applicable to offences charged under Article 4—although no Trial Chamber has analysed those elements specifically under Article 4.”

[53] *Prosecutor v Vasilejevic*, No. IT-98-32-T, *Judgement* (29 November 2002) at para 203; cited in *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Judgement* (21 February 2003) at para. 860

[54] *Prosecutor v Kunarac et al*, No. IT-96-32-A, *Judgement* (12 June 2002) at para 56

[55] *Prosecutor v Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para. 25

[56] Mr. Nzirorera vigorously opposes the prosecution’s effort to have the Trial Chamber take judicial notice of the character of the conflict and thereby preclude him from presenting evidence on this element.

[57] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 366

[58] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 444

[59] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at paras. 368-69

[60] *Prosecutor v Kunarac et al*, No. IT-96-23-A, *Judgement* (12 June 2002) at para 58; *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para 517

[61] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 569

[62] *Prosecutor v Rutaganda*, No. ICTR-96-3-T, *Judgement* (6 December 1999); *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgement* (13 September 2002) at para. 11; *Prosecutor v Ntakirutimana*, No. ICTR-96-10, *Judgement* (21 February 2003); *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003).

[63] No. ICTR-96-3-A, *Judgement* (26 May 2003)

[64] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 570

[65] *Prosecutor v Rutaganda*, No. ICTR-96-3-T, *Judgement* (6 December 1999) at para. 34

[66] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 379

[67] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A , *Judgement* (1 June 2001) at para 198.

[68] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 59; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 473; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment* (14 February 2005) at para. 45; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at fn. 38; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at paras. 52-53; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-I, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment* (15 July 2004) at para. 32-33

[69] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 380; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 503 ; *Prosecutor vBrdjanin* ,No. IT-99-36-T, *Judgement* (1 September 2004) at para 358

[70] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para. 381; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 504 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.279

[71] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para 382; *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 361; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 505 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.281

[72] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.283

[73] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para 383; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 506 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.285

[74] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at paras 384-85

[75] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 507 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.286

[76] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Judgement* (21 February 2003) at para 787; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 726

[77] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 355

[78] *Prosecutor v Semanza*, No. ICTR 97-20-T, *Judgement* (15 May 2003) at para 388; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 499

[79] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 727

[80] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 20

[81] *Prosecutor v Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para. 195

[82] *Prosecutor v Vasilijevic*, No. IT-98-32-A, *Judgement* (25 February 2004) at para. 97; *Tadic* at para. 196

[83] *Prosecutor v Vasilijevic*, No. IT-98-32-A, *Judgement* (25 February 2004) at para. 99; *Tadic* at para. 204

[84] *Tadic* at para. 227

[85] *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 97

[86] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para. 344

[87] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 400; *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 87; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 627

[88] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 401

[89] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 402

[90] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 628; *Prosecutor v Delalic et al*, No. IT-96-21-A, *Judgement* (21 February 2001) at para 266,303; *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-T, *Judgement* (26 February 2001) at para. 839; *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15

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[91] *Prosecutor v Niyitegeka*, No. ICTR-96-14-T, *Judgement* (16 May 2003) at para. 474

[92] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 412

[93] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 417

[94] Williamson, "Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda", 13 *Criminal Law Forum* 368 (2002)

[95] *Prosecutor v Niyitegeka*, No. ICTR-96-14-T, *Judgement* (16 May 2003) at para. 476

[96] *Prosecutor v Hadzihasanovic et al*, No. IT-01-47-AR72 (16 July 2003) at para 51

[97] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 84

[98] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.150

[99] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at paras 404-05; *Prosecutor v Delalic*, No. IT-96-21-A, *Judgement* (21 February 2001) at para. 241

[100] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 45

[101] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 648; *Prosecutor v Bagilishema*, No. ICTR-95-1A-A , *Judgement* (3 July 2002) at para 29, citing *Prosecutor v Delalic*, No. IT-96-21-A , *Judgement* (21 February 2001) at para 386 from Report of Commission of Experts for the former Yugoslavia

[102] *Prosecutor v Blaskic*, No. IT-95-14-A *Judgement* (29 July 2004) at para. 62

[103] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para 42

[104] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para 37

[105] *Prosecutor v Delalic*, No. IT-96-21-A, *Judgement* (21 February 2001) at para 239

[106] *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003) at para. 406

[107] *Prosecutor v Delalic et al*, No. IT-96-21-A, *Judgement* (21 February 2001) at para 266

[108] *Prosecutor v Stakic*, No. IT-97-24-T, *Judgement* (31 July 2003) at para 461; *Prosecutor v Galic*, No. IT-98-29-T, *Judgement* (5 December 2003) at para. 176; Williamson, “Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda”, 13 *Criminal Law Forum* 381 (2002)

[109] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 129

[110] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 98

[111] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A (2 July 2002) at para. 78

[112] *Prosecutor v Bagilishema*, No. 95-1A-A (2 July 2002) at para. 99

[113] *Prosecutor v Akayesu*, No. ICTR 96-4-A (1 June 2001) at para 142

[114] *Prosecutor v Akayesu*, No. ICTR 96-4-A (1 June 2001) at para 169

[115] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 316; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 96

[116] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T (21 February 2003) at para. 425; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 33

[117] para. 108

[118] *Prosecutor v Kupreskic*, No. IT-95-16-A (23 October 2001) at para 190

[119] *Prosecutor v Kupreskic*, No. IT-95-16-A (23 October 2001) at para 346

[120] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A (2 July 2002) at para 87

[121] para. 138

[122] *Prosecutor v Kamuhanda*, No. ICTR-98-54A-T (13 May 2003) at para 18; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T (12 May 2003) at para 25; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T (21 May 2003) at para 32-34; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 220

[123] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A (2 July 2002) at para 71; see also *Prosecutor v Musema*, No. ICTR-96-13-A (16 November 2001) at para 127; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A (1 June 2001) at para. 95