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TRIAL CHAMBER I11

Before: Judge Inés Monica Weinberg de Roca, presiding
Judge Flavia Lattanzi
Judge Gberdao Gustave Kam

Registrar: Adama Dieng

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THE PROSECUTOR
V.
Simon BIKINDI
(CASE No. ICTR-2001-72-I)

THE PROSECUTOR'S PRELIMINARY PRE-TRIAL BRIEF PURSUANT TO ARTICLE 73 bis (B)(i) OF THE RULES OF PROCEDURE AND EVIDENCE

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
OFFICE OF THE PROSECUTOR

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A: INTRODUCTION

1. The Prosecutor files this Pre-Trial Brief pursuant to Rule 73 *Bis* (B)(i) of the Rules of Procedure and Evidence of the Tribunal ("The Rules"). In compliance with Rule 73 *Bis* (B)(i), the Pre-Trial Brief addresses the factual and legal issues pertinent to the Accused and also sets out the nature of the Prosecutor's case against him.

B. OVERVIEW OF THE CHARGES IN THE INDICTMENT

2. The Indictment charges the accused with the following crimes:
   (a) Conspiracy to commit Genocide;
   (b) Genocide, alternatively,
   (c) Complicity in Genocide
   (d) Direct and Public Incitement to commit Genocide,
   (e) Persecution as Crimes Against Humanity, and
   (f) Murder as Crimes Against Humanity.

3. These offences are enshrined in Articles 2 and 3 of the Statute of the Tribunal ("The Statute) and are punishable pursuant to Articles 22 and 23 of the Statute.

(i) Cumulative Charges

4. The accused is charged cumulatively with all offences on the basis of the same set of allegations/facts contained in paragraphs 1 to 48 of the Indictment.

5. The Prosecutor submits that it is settled law in this Tribunal - the International Criminal Tribunal for Rwanda ("The ICTR") and that of the Hague – the International Criminal Tribunal for the Former Yugoslavia ("The "ICTY"), as well as the Appeals Chamber of both Tribunals, that cumulative charging is permissible.[1] Cumulative charging approach is legitimate if the offences, as in the present case, contain different material elements.

6. Moreover, as the Appeals Chamber has held, basing several charges on the same facts is legitimate as prior to the presentation of all evidence, it is not possible to determine with certainty which of the charges brought against the accused will be proved.[2] The Appeals Chamber concluded that a Trial Chamber "is better poised, after the parties' presentation of evidence, to evaluate which of the charges may be retained upon the sufficiency of the evidence[3]."

7. On the basis of various acts and omissions committed by the accused either alone or jointly with co-perpetrators or both as described in paragraphs 1 to 48 of the Indictment, the Prosecutor charges the accused with the above crimes as follows:

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[1] Musema A.C Judgment dated 16 Nov 2001 para 369
[2] Celebici A.C Judgment para 412
[3] Jelisic A.C Judgment para 78

(a) **Count 1**: *Conspiracy to commit Genocide* (a crime stipulated in article 2(3)(b), 6(1) of the Statute.) in that, on or between the dates of 1st January 1994 and 31st December 1994, SIMON BIKINDI did conspire with others, including, but not limited to, the political leadership of the MRND at the regional and National level, to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group.

(b) **Count 2**: *Genocide* (a crime stipulated under Article 2(3)(a), 6(1) and 6(3) of the Statute): for killing or causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group as such.

(c) **Count 3**: *Complicity in Genocide* (in alternative to genocide), (a crime stipulated under Article 2(3)(e) and 6(1) of the Statute): for instigating, procuring the means, for aiding and abetting or otherwise for facilitating the killing or causing serious bodily or mental harm to members of the Tutsi population.

(d) **Count 4:** *Direct and Public incitement to commit genocide,* a crime stipulated in Article 2(3)(c), 6(1) and 6(3) of the statute, in that the accused was responsible for directly and publicly inciting persons, including, but not limited to, soldiers, local administrative officials, communal police, civilian militias and local residents, to kill or cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group.

(e) **Count 5 :** *Murder, as a crime against humanity* (a crime stipulated under Article 3 (a) 6(1) and 6(3) of the Statute, in that the accused was responsible for murder, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

(f) **Counts 6:** *Persecution as a crime against humanity* (a crime stipulated under Article 3 (h) of the Statute), During the period 1990-1994,SIMON BIKINDI addressed public gatherings, composed, performed, recorded or disseminated. musical compositions extolling Hutu solidarity and characterizing Tutsi as enslavers of the Hutu. These compositions were subsequently deployed in a propaganda campaign to target Tutsi as the enemy, or as enemy accomplices, and to instigate, incite and encourage the Hutu population to separate themselves from the Tutsi, to commit acts of violence against them on political and racial grounds to kill them.

(ii) Cumulative Charges under Both Article 6(1) and 6(3) of the Statute

8. The Indictment charges the accused for individual criminal responsibility under Article 6(1) and for superior responsibility under Article 6(3) of the Statute.

9. The Prosecutor submits that this approach is legally acceptable as both forms of criminal culpability are not mutually exclusive. In this regard, the Prosecutor draws the attention of the Trial Chamber to the *Prosecutor v. Kayishema and Ruzindana* Judgment.[4]

10. The Prosecutor also draws the attention of the Trial Chamber to the *Blaskic* judgment where it was held that nothing prevents the Prosecutor from pleading an alternative responsibility (Article 7(1) or Article 7(3) of the Statute, but the factual allegations must be sufficiently precise so as to permit the accused to prepare his defence on either or both alternatives.[5]

11. In the *Prosecutor v. Celebici*, the Trial Chamber not only found the charging of both articles 7(1) and 7(3) legally permissible, but it also found that conviction under both articles was possible. It thus held that "whilst the proposition [that responsibility under both articles is mutually exclusive] in theory appears to be unimpeachable, in practice there are factual situations rendering the charging and conviction of the same person under both Article 7(1) and 7(3) perfectly appropriate.

12. Moreover, the Prosecutor submits that it is in the interest of justice that the Trial Chamber considers both forms of criminal responsibility in order to fully reflect the criminal culpability of the accused, as was stressed in the *Prosecutor v. Kayishema and Ruzindana* Judgment.

C: PROSECUTOR'S FACTUAL ALLEGATIONS AGAINST SIMON BIKINDI.

(i) The Accused – Simon BIKINDI

13 **Simon BIKINDI** was born on 28 September 1954 in Rwerere commune, Giseny prefecture, in the Republic of Rwanda. At the time of the events referred to in this indictment, Simon BIKINDI was a well known composer and singer of popular music and director of the performance group *Irindiro* ballet.

14. **Simon BIKINDI** was also an official in the ministry of Youth and Sports of the Government of Rwanda and a member of the MRND political party.

(ii) The Factual Allegations

15. **Simon BIKINDI** agreed or collaborated with Head of State Juvénal HABYARIMANA, Minister of Youth and Sports Callixte NZABONIMANA, national *Interahamwe* leader Robert KAJUGA, national MRND political leaders, such as Mathieu NGIRUMPATSE, André NTAGERURA and Joseph NZIRORERA, and MRND-aligned military leaders, such as Theoneste

[4] Kayishema & Ruzindana T.C Judgment para 210
[5] Decision on the defence motion to dismiss the indictment 4 April 1997 para 32

BAGOSORA and Georges RUTAGANDA, to militarize the MRND *Interahamwe* youth wing and to indoctrinate *Interahamwe* militias with anti-Tutsi ideology and to disseminate anti-Tutsi propaganda. 19 -22 and 24- 28

16. During the early 1990's, the tight circle of MRND party and military leaders surrounding President HABYARIMANA devised and implemented a strategy to consolidate their hold on government power in the face of rising domestic political opposition and the threat of military attack by the RPF. That strategy: to incite hatred and fear of the Tutsi and to characterize the Tutsi as *ibityso*, domestic accomplices of a foreign invading enemy army. Also incorporated in that strategy: the creation of civilian militias exclusively aligned with the MRND party that would be armed, trained and sensitized to exterminate the Tutsi population.

17. Notably, in December 1991 Juvénal HABYARIMANA, at that time Commander in Chief of the *Forces Armées Rwandaises* (FAR) as well as Head of State, set up a military commission to devise an agenda to *"defeat the enemy militarily, in the media and politically."* The commission generated a report that defined the enemy as: *...Tutsis from inside or outside the country who are extremist and nostalgic for power, who have never recognized and do not yet recognize the realities of the Social Revolution of 1959, and are seeking to regain power in Rwanda by any means, including taking up arms.* Army Chief of Staff Déogratias NSABIMANA caused excerpts from the report to be circulated among the military Sector Commanders.

18. Subsequently, MRND-aligned military leaders provided military training and weapons to *Interahamwe* militias and sensitized the MRND youth wing to target the Tutsi and members of the political opposition as accomplices of the enemy. This military training was organized throughout Rwanda, particularly in military camps in Kigali, in Mutara and in Gisenyi.

19. Prior to the events of April 1994, at the end of 1993 and at the beginning of 1994 **Simon BIKINDI** participated in the campaign to *defeat the enemy militarily* by conducting MRND membership drives and participating in recruitment in Mutara in late 1993, and military training of *Interahamwe* militias in Mutara in late 1993, and on several occasions in January 1994 with French soldiers at Club Jaly, in Kigali, knowing and intending that such civilian militias would be deployed in exterminating campaigns against the Tutsi.

20. For example, several times in January 1994 **Simon BIKINDI** was present and participated in military training of *Interahamwe* militias at Club Jaly, Kiyoru, in Kigali-ville. On these occasions in January 1994 **Simon BIKINDI**, accompanied by RUCYERATABARO, NGWIGE, and BOSCO were driven by **Simon BIKINDI's** driver to Club Jaly where they were to train the *Interahamwe* militias with French Soldiers. On these occasions **Simon BIKINDI** took part in the

military exercises carried out at Club Jaly, by providing drills and instructions on manipulation of arms.

21. **Simon BIKINDI** participated in the campaign to *defeat the enemy in the media* by collaborating with Ferdinand NAHIMANA, Jean-Bosco BARAYAGWIZA, Félicien KABUGA, André NTAGERURA, Georges RUTAGANDA, President Juvénal HABYARIMANA, Callixte NZABONIMANA, Joseph SERUGENDO and Joseph NZIRORERA, to launch *Radio-Télévision Libre des Milles Collines*, SA (RTLM), a privately owned radio station of which Simon BIKINDI was a share holder aligned with extremist political currents in the MRND and the CDR. RTLM in part conceived as a media alternative to Radio Rwanda, then subject to the programming restrictions of ORINFOR and the newly installed Ministry of Information, RTLM programming interspersed popular music and listener participation with news reports and anti-Tutsi propaganda.

22. Although the preamble to the statutes creating RTLM defines its purpose as facilitating the circulation of diverse ideas and objective news reporting, in actuality RTLM was created as a vehicle for anti-Tutsi propaganda. RTLM's anti-Tutsi broadcasts were often punctuated by recorded musical selections containing both instrumental music and lyrics composed and performed by **Simon BIKINDI**. The intertwining objectives of RTLM's media programming and **Simon BIKINDI**'s musical recordings were the same: to sensitize and incite the listening public to target and commit violent acts against the Tutsis, particularly the civilian militias, the government armed forces and the masses of Rwanda's Hutu peasantry; and to extol Hutu solidarity and to target the Tutsi as accomplices of the enemy.

23. RTLM received logistical support from Radio Rwanda, the government-owned radio station, and initially broadcasted its programs on the same frequencies as Radio Rwanda, enabling government-controlled Radio Rwanda broadcasts to flow seamlessly into the privately controlled programming of RTLM. Minister of Transports and Communications André NTAGERURA, a longstanding senior member of the MRND, facilitated such seeming government support of RTLM by authorizing the continued broadcasts in spite of RTLM's violations of Rwanda media legislation.

24. Callixte NZABONIMANA, a member of MRND, authorized and sponsored rehearsal and recording of **Simon BIKINDI**'s musical compositions and live performances of his dance troupe IRINDIRO BALLET through and at the Ministry of Youth and Sports in Kigali, in his capacity as Minister of Youth and Sports. **Simon BIKINDI** organized the rehearsals and rehearsed his compositions with youth groups at the level of the *commune*, including at Rwerere commune and Rubavu commune in late 1993 and early 1994. The Minister of Youth and Sports financed the rehearsals with money being paid to the youth groups, in some instances through the *Bourgmestres* of the Rwerere commune and Rubavu commune.

25. **Simon BIKINDI** consulted with President Juvenal HABYARIMANA, Minister of Youth and Sports Callixte NZABONIMANA and MRND-aligned military authorities on song lyrics as follows: In order to release a musical composition **Simon BIKINDI** provided a tape with his recorded composition to Callixte NZABONIMANA, who in turn would indicate what changes he thought were necessary. The recorded composition was then passed on to President Juvenal HABYARIMANA who would listen to the tape to ensure that it was in line with government policy and subsequently authorize its release. **Simon BIKINDI** also recorded his compositions at the Radio Rwanda studios with assistance from Joseph SERUGENDO. In late 1993 **Simon BIKINDI** made available to the RTLM for broadcast those songs that had been authorized for release, as set out above. **Simon BIKINDI** also performed his compositions at *Interahamwe* meetings and MRND and CDR party functions, most of which were large public gatherings that were frequently held on Saturdays or Sundays at various stadiums in different parts of Rwanda, including Ruhengeri, Cyasemakamba, Nyamirambo, Cyangugu, Umuganda as well as in Rubona, Bicumbi commune and in Ruyenzi, Gitarama commune.

26. RTLM played **Simon BIKINDI**'s compositions several times a day, usually during an early morning broadcast, at lunchtime and in the early evening. After the reprise of civil hostilities in the non-international armed conflict, between April and July 1994, RTLM broadcast **Simon BIKINDI**'s compositions repeatedly throughout the day. The compositions that received intense airplay were *Bene sebahinzi* and *Naga abahutu*, songs that encouraged Hutu solidarity against a common foe.

27. Over the course of April, May, June and the first few days of July of 1994, hundreds of thousands of civilian Tutsi men, women, children and the elderly, were persecuted, attacked, sexually assaulted, tortured, sequestered, and killed in Kigali-ville and Gisenyi *préfectures* and all across Rwanda. These attacks and killings were products of the Government campaign to *defeat the enemy* by enlisting local administrative authorities and civilians, organized as civilian militias or acting individually, to exterminate the Tutsi.

28. The efficiency of the mobilization of Rwanda's Hutu peasantry for attacks upon the Tutsi during the period 7 April 1994 - mid July 1994, and the systematic nature of such attacks by the military forces of the Interim Government, including civilian militias equipped, trained and sensitized to target Tutsi civilians, imply planning and coordination at the highest levels of the political, military, business and media elites of MRND-affiliated governmental authorities. **Simon BIKINDI**'s musical compositions and live performances and recruitment, training and command of *Interahamwe*, were elements of the plan to mobilize civilian militias to destroy, in whole or in part, the Tutsi. **Simon BIKINDI's** songs were a crucial part of the genocidal plan because they incited ethnic hatred of Tutsis and further incited people to attack and to kill Tutsi because they were

Tutsi. As a result of the mobilizing effect of **Simon BIKINDI's** music, members of the Ballet, including Kizito DUSENGIMANA, were recruited into the *Interahamwe* militia, participated in military training and committed subsequent killings of Tutsis.

29. Between July 1994 and early 1995 **Simon BIKINDI** continued to demonstrate his anti – Tutsi stance when, following the military defeat of the FAR and the retreat of the Interim Government across the border into neighboring Zaire, he continued the anti- Tutsi campaign by composing and performing anti- Tutsi songs and by collaborating with ex-FAR military leaders and former MRND-aligned government officials to continue the anti- Tutsi campaign as a means to regain power.

30. During the events referred to, particularly from 6 April 1994 through the first days of July 1994, *Interahamwe* militias engaged in a campaign of extermination against Rwanda's Tutsi population. Hundreds of thousands of Tutsi men, women and children were killed.

31. **Simon BIKINDI**, among others, planned, instigated and prepared such killings by recruiting members for the *Interahamwe* militias, organizing and participating in military training for *Interahamwe* militias, indoctrinating *Interahamwe* militias with anti-Tutsi ideology and by engaging in a propaganda campaign to characterize civilian Tutsi citizens of Rwanda as accomplices of an invading enemy, and by specifically encouraging the militias to target the Tutsi population for attack, as set out in paragraphs 32- 41 below.

32. During June and early July 1994, particularly in Gisenyi *préfecture*, **Simon BIKINDI** led, participated in, instigated and incited a campaign of violence against civilian Tutsis and against Hutus perceived to be politically opposed to the MRND and MRND-aligned political parties, resulting in numerous deaths.

33. Sometime in mid-late June 1994 **Simon BIKINDI** and a band of *Interahamwe* that had arrived in Gisenyi from Kigali launched an attack on Tutsi living in Nyamyumba *commune*. Just prior to the attack, **Simon BIKINDI** announced to *Interahamwe* at a roadblock in Gisenyi-town that they should search out the Tutsis and kill them, and that Hutus helping Tutsis to flee to Zaire should also be killed. After these words, **Simon BIKINDI** led a caravan of armed *Interahamwe*, including Col. BUREGEYA and NOEL, to Nyamyumba and killed Tutsi residents and pillaged their belongings.

34. In mid-late June 1994 **Simon BIKINDI** addressed a MRND meeting at Umuganda Stadium in Gisenyi where he publicly stated that, *"Hutus should know who the enemy is, and that the enemy is the Tutsi"* and that *"Hutus should hunt and search for the Tutsis and kill them."* Following the meeting there was an intensive search for Tutsi that were still hiding, and as a result of this intensive

search Tutsis were killed, including ANCILLA and her 4 year old daughter, as set out in paragraph 39 below.

35. In June 1994, at the border between Gisenyi and Zaire, following instructions from Lt. Colonel Anatole NSENGIYUMVA, **Simon BIKINDI** ordered the *Interahamwe* in his company and to whom he gave orders to take a group of Tutsi women that were trying to escape to Zaire behind a kiosk called Command Post and to kill them. The women were killed with UZI guns behind the Command Post. Shortly thereafter **Simon BIKINDI** remarked, *"See where we are now with the Tutsis."*

36. In June 1994, **SIMON BIKINDI** went to Gisenyi prison in the company of Hassan Ngeze, Major Kabera, the prison Director Gasirabo and more than ten body guards. The prison guard Rukara called out the names of 12 prisoners who came out of their cells and were told to stand beside the prison latrine pit. **Simon BIKINDI** then asked the prison director Gasirabo why the 12 prisoners were still alive whilst in Kigali all Tutsis had been killed. The prison director Gasirabo responded that he had been given these prisoners to keep them and he did not know if they were to be killed. Ngeze then asked all the Tutsis prisoners to raise their hands in the air, and 10 of the prisoners who were Tutsi did. Reading from a list of twelve prisoners, **Simon BIKINDI** then called out the names of Tutsi prisoners, starting with Matabaro and Kayibanda. Matabaro came forward to stand near to where **Simon BIKINDI** stood, and he was hit in the back of the head with the back of an axe by one of the bodyguards. **Simon BIKINDI** then called out the name of Kayibanda who was also hit on the back of the head with the back of an axe by **BIKINDI's** body guard. Matabaro and Kayibanda both died as a result of the blows. Eight of the other persons whose names were on the list, all Tutsis, were killed by **BIKINDI's** bodyguards, using bayonets. By reading out from a list of Tutsi prisoners, by asking why they had not yet been killed, **Simon BIKINDI** instigated, and aided and abetted the immediate killings of two of the prisoners, namely Matabaro and Kayibanda. In respect of the other eight Tutsi prisoners who were killed immediately afterwards by **Simon BIKINDI's** bodyguards, by his initial question as to why all the Tutsi prisoners had been not been killed before his arrival at the prison, he instigated, and aided and abetted their subsequent killings by his bodyguards.

37. At the end of June 1994, **Simon BIKINDI**, was in charge of, and provided orders to the *Interahamwe* manning a roadblock at scout camp, near the Pentecostal church on the way to commune rouge, Gisenyi. At this roadblock several Tutsi were massacred. By the following actions of:

(a) exercising effective control over the *Interahamwe* who manned this roadblock;
(b) giving orders to these *Interahamwe* to kill Tutsis at the roadblock;
(c) several Tutsis actually being killed at the roadblock;
(d) coming to the roadblock several times;

Simon BIKINDI knew or ought to have known that several Tutsis had been killed at this roadblock as a result of his orders. **Simon BIKINDI** ordered, instigated, aided and abetted the deaths of several Tutsis at the scout camp roadblock.

38. In early July 1994, **Simon BIKINDI** in the company of the *Interahamwe* to whom he gave orders transported three Tutsi women by removing them from a compound in Gacuba cellule in Gisenyi and driving them in his car to the commune rouge where they were killed by the *Interahamwe*.. By transporting the three Tutsi women to the commune rouge where he knew that they would be killed as other Tutsis were being killed at the same location, **Simon BIKINDI** planned, instigated, and aided and abetted their killings.

39. In early July 1994, NOEL and PASCAL, two of the *Interahamwe in* **Simon BIKINDI**'s company and to whom he gave orders, discovered that ANCILLA, a Tutsi woman, had been hiding in the ceiling of her home, in Murara, Rubavu commune, Gisenyi prefecture, apparently protected by her Hutu husband. **Simon BIKINDI** stated that she was one of the people fighting Hutus and that she should be taken away (killed) and was present when NOEL and PASCAL led ANCILLA away. NOEL and PASCAL killed the woman and her 4-year-old daughter and buried them in a shallow grave.

40. Sexual violence against Tutsi women was systematically incorporated in the generalized attacks against the Tutsi. In leading, ordering and encouraging the campaign of extermination in Gisenyi *préfecture*, **Simon BIKINDI** knew, or should have known, that sexual violence against civilian Tutsi was, or would be, widespread or systematic, and that the perpetrators would include his subordinates or those that committed such acts in response to his generalized orders and instructions to exterminate the Tutsi. For example, in late June 1994, at about 6pm, **Simon BIKINDI** led a group of *Interahamwe*, including Jean KAVUNDERI (Noel's younger brother), PASCAL, CARI, SELAMANI, KABULIMBO, and SENDEGEYA to Rubavu, and ordered them to kill all of the Tutsis in the area. In the course of executing **Simon BIKINDI's** orders, the *Interahamwe* under his effective control also committed rapes of Tutsi women, of which **Simon BIKINDI** was aware, or ought to have been aware by his presence and effective supervision of the killing and rape operations of the *Interahamwe*. Notably, the *Interahamwe* called SENDEGEYA boasted in the hearing of other persons in the vicinity of the crimes, including **Simon BIKINDI**, after the rape and murder of ANCILLA that he "had always dreamt of sleeping with a Tutsi woman and now his dream had come true". During the killings and rape perpetrated by the *Interahamwe* in **Simon BIKINDI's** company and to whom he gave orders, including the perpetrators named above, **Simon BIKINDI** stood by the road near the home of ANCILLA to ensure his orders were carried out by the *Interahamwe*. By ordering the *Interahamwe* under his effective control to commit acts of violence against Tutsis in Rubavu commune, which included acts of killing and sexual violence, and by effectively staying on the road close to the

scene of these crimes to ensure his orders were followed, **Simon BIKINDI** was aware, or ought to have been aware of the acts of rape and sexual violence committed by the *Interahamwe* under his effective control, notably SENDEGEYA, on ANCILLA. Notably still, when the said *Interahamwe* boasted in the hearing of other persons in the vicinity of the crimes, including **Simon BIKINDI**, after the rape of ANCILLA that he "had always dreamt of sleeping with a Tutsi woman and now his dream had come true", by these specific actions, **Simon BIKINDI** ordered, instigated and aided and abetted in these rapes, notably, in the rape of ANCILLA.

41. **Simon BIKINDI's** command of the *Interahamwe* is demonstrated by the following facts:

(a) **Simon BIKINDI** was recognized as one of the most creative persons within the *Interahamwe* organization and with that talent assumed the role of inspirational leader;

(b) **Simon BIKINDI's** participation in military training of *Interahamwe* militias in Kigali;

(c) **Simon BIKINDI** founded the IRINDIRO Ballet whose members were MRND *Interahamwe* or members of the extremist CDR;

(d) **Simon BIKINDI** launched an attack with the *Interahamwe* on Tutsi living in Nyamyumba commune. Just prior to the attack, **Simon BIKINDI** announced to *Interahamwe* at a roadblock in Gisenyi-town that they should search out the Tutsis and kill them, and that Hutus helping Tutsis to flee to Zaire should also be killed. After these words, **Simon BIKINDI** led a caravan of armed *Interahamwe,* including Col. BUREGEYA and NOEL, to Nyamyumba and killed Tutsi residents and pillaged their belongings;

(e) **Simon BIKINDI** ordered *Interahamwe* to take a group of Tutsi women that were trying to escape to Zaire behind a kiosk called Command Post and to kill them;

(f) **Simon BIKINDI** ordered *Interahamwe* at the roadblock at the scout camp, to kill Tutsi;

(g) **Simon BIKINDI** ordered *Interahamwe,* in early June 1994, in Murara, Rubavu commune, Gisenyi, to kill ANCILLA, a Tutsi women;

(h) **Simon BIKINDI** led a caravan of *Interahamwe* on the main road between Kivumu and Kayove communes and made anti – Tutsi announcements using his vehicle outfitted with a public address system;

(i) **Simon BIKINDI** incited *Interahamwe* on 26 February 1994 to attack a group of Tutsi seeking refuge in the Gatenga Youth Center in Kigali;

(j) *Interahamwe* guarded **Simon BIKINDI'S** bar in Gatenga sector, Gikondo, Kigali; and

42. By virtue of his command of the *Interahamwe*, particularly as reinforced by his close association with leading figures in the national leadership of the MRND and the *Interahamwe*, coupled with his unique status as a nationally recognized performer and director of the *Irindiro Ballet*, **Simon BIKINDI** ordered or directed or otherwise authorized civilian militias, particularly *Interahamwe* members of his own *Irindiro Ballet*, including Bosco SERUMVERI and Kizito DUSENGIMANA, to persecute and kill or facilitate the killing of civilian Tutsi. By virtue of that same authority **Simon BIKINDI** had the ability and the duty to halt, prevent, discourage or sanction persons that committed, or were about to commit, such acts, and did not do so.

43. During the period 1990 to 1994. **Simon BIKINDI** composed, performed, recorded or disseminated musical compositions extolling Hutu solidarity and characterizing Tutsi as enslavers of the Hutu. These compositions were subsequently deployed in a propaganda campaign to target Tutsi as the *enemy*, or as *enemy accomplices*, and to instigate, incite, and encourage the Hutu population to separate themselves from the Tutsi and to kill them.

44. **Simon BIKINDI** regularly performed his musical compositions at animation sessions at *Interahamwe* meetings and at political gatherings of the MRND and CDR political parties in various stadiums in different parts of Rwanda, including, Ruhengeri, Cyasemakamba, Nyamirambo, Cyangugu, Umuganda, as well as in Rubona, Bicumbi commune and in Ruyenzi, Gitarama commune, in late 1992, in 1993 and at the beginning of 1994, in the Kigali and Gisenyi prefectures. **Simon BIKINDI** often circulated about Gisenyi town and Rwerere *commune*, Gisenyi *prefecture* in late June 1993, and February and March 1994, aboard a vehicle outfitted with a public address system and performed his compositions or broadcasted recordings of his compositions.

45. **Simon BIKINDI**'s animation sessions at MRND meetings and rallies in late 1993, early 1994 and June 1994 were often considered a prelude or a motivating factor in anti-Tutsi violence against individuals and property in the vicinity of those public gatherings, both leading up to the meetings or immediately thereafter. Some of these MRND meetings and rallies included one which took place at Umuganda stadium, Gisenyi, in June 1994, and one which took place at a football ground in Kivumu sector, Nyamyamba commune, Gisenyi prefecture, in 1993.

46. **Simon BIKINDI** publicly addressed MRND and CDR adherents at party meetings with specific exhortations to work, a coded reference advocating the extermination of the Tutsi, as set out in paragraphs 47 and 48 below.

47. In February 1994, shortly following the assassinations of Martin BUCYANA and Félicien GATABAZI, **Simon BIKINDI** addressed an MRND meeting at Umuganda Stadium in Gisenyi and told the population to take their clubs,

machetes and other weapons and to look for the *inyenzi* and kill them. *Inyenzi* was a derogatory reference to the Tutsi.

48. In March 1994 **Simon BIKINDI** addressed a meeting of the CDR and encouraged those in attendance to *work* and to kill those opposed to the CDR and the MRND. During the period relevant to this indictment, it was well known throughout Rwanda that the CDR was opposed to the Tutsi.

49. **Simon BIKINDI** also advocated the extermination of the Tutsi over the public radio air-waves. For example, sometime following the deaths of BUCYANA Martin and another CDR-affiliated *Interahamwe*, **Simon BIKINDI** stated in a speech of his made in Nyamirambo stadium that was recorded and then broadcast over RTLM radio station air-waves between February 1994 and March 1994, *"See how the Tutsi are exterminating you, the Hutu. If you do not react right away it's your fault..."*.

50. During the last week of February 1994 **Simon BIKINDI** attempted to incite violence against a group of Tutsi that had taken shelter at the Gatenga Youth Center in Kigali. When gendarmes prevented Simon BIKINDI and the group of *Interahamwe* in his company and to whom he gave orders from attacking the youth center, Simon BIKINDI telephoned the RTLM radio station to report that some Hutus were preventing Hutus from attacking the Tutsi at Gatenga, and his telephone words were broadcast over the RTLM radio station air-waves.

51. In late June 1994 in Gisenyi *préfecture* **Simon BIKINDI** operated a vehicle outfitted with a public address system and led a caravan of *Interahamwe* on the main road between Kivumu and Kayove *communes* announcing, *"The majority population, it's you, the Hutu I am talking to. You know the minority population is the Tutsi. Exterminate quickly the remaining ones."* **Simon BIKINDI** also used the vehicle-mounted public address system to broadcast his musical compositions in 1993 and late June 1994.

52. **Simon BIKINDI**'s song lyrics manipulated the politics and history of Rwanda to promote Hutu solidarity. Among **Simon BIKINDI**'s most popular compositions is *Twasezereye*, a song composed in 1987 which *means "we said good bye to the feudal regime"*. Repeatedly broadcast over Radio Rwanda and RTLM airwaves in 1992 and 1993 *Twasezereye* was a public call for Hutu solidarity in opposition to the Arusha accords.

53. RTLM repeatedly broadcasted other **Simon BIKINDI** compositions, notably *Bene sebahinzi*, which means "the sons of the father of the cultivators", and *Nanga bahutu*, which means "I hate these Hutu ...".Calls for attacks on the enemy in RTLM broadcasts were often preceded or followed by these songs composed and performed by **Simon BIKINDI**. By the terms of Rwandan legislation governing author's rights, **Simon BIKINDI** had a right to forbid or enjoin public broadcasts of his compositions.

54. During the events referred to particularly from 6 April 1994 through 17 July 1994, there were throughout Rwanda widespread or systematic attacks directed against a civilian population on political, ethnic or racial grounds. Notably, *Interahamwe* militias engaged in a campaign of violence against Rwanda's civilian Tutsi population and against Hutu perceived to be politically opposed to the MRND. Hundreds of thousands of civilian Tutsi men, women and children and "moderate Hutu" were killed.

55. **Simon BIKINDI**, among others, planned, instigated and prepared such killings by recruiting members for the *Interahamwe* militias, organizing military training for *Interahamwe* militias, indoctrinating *Interahamwe* militias with anti-Tutsi ideology and by engaging in a propaganda campaign to characterize the Tutsi citizens of Rwanda as accomplices of an invading enemy and by specifically encouraging civilian militias to target Tutsi for attack.

56. During June 1994, on a date uncertain, in Nyamyumba *commune*, Gisenyi *préfecture*, **Simon BIKINDI** participated in the killing of a wealthy Tutsi businessman (Name unknown) by leading a band of *Interahamwe* to the man's home and by ordering several *Interahamwe*, including Paulin (last name unknown) and NOKORI, and members of his ballet, including SERUMVERI Bosco and DUSENGIMANA Kizito, to kill the Tutsi businessman and to steal his property. The group killed the businessman and loaded his property onto **Simon BIKINDI**'s vehicle. By ordering and instigating the killing of the Tutsi businessman (Name unknown) Simon BIKINDI is responsible for his death.

57. Sometime during June 1994 at the border crossing between Gisenyi and Zaire, following instructions from Col. Anatole NSENGIYUMVA, **Simon BIKINDI** ordered the *Interahamwe* in his company and to whom he gave orders to kill a group of Tutsi women that were trying to escape across the border to Zaire. The women were then killed with UZI guns.

58. In early July 1994 in Murara, Rubavu commune, Gisenyi prefecture, **Simon BIKINDI** instigated the killing of ANCILLA, a Tutsi woman, by advising NOEL and PASCAL, two of the *Interahamwe* in his company and to whom he gave orders, that she was one of the people fighting Hutus and that she should be taken away (killed). NOEL and PASCAL killed the woman and her 4-year-old daughter and buried them in a shallow grave.

59. Given the generalized nature of attacks against the Tutsi during April through July 1994, **Simon BIKINDI** is specifically responsible for the killings of numerous Tutsi set-out below, that followed his exhortations in deed and in song and in word, particularly as directed to *Interahamwe* and civilian militias:

(a) Sometime in mid-late June 1994 **Simon BIKINDI** and a band of *Interahamwe* that had arrived in Gisenyi from Kigali launched an

attack on Tutsi living in Nyamyumba commune. Just prior to the attack, **Simon BIKINDI** announced to *Interahamwe* at a roadblock in Gisenyi-town that they should search out the Tutsis and kill them, and that Hutus helping Tutsis to flee to Zaire should also be killed. After these words, **Simon BIKINDI** led a caravan of armed *Interahamwe* including Col. BUREGEYA and NOEL, to Nyamyumba and killed Tutsi residents and pillaged their belongings;

(b) In June 1994, at the border between Gisenyi and Zaire, following instructions from Lt. Colonel Anatole NSENGIYUMVA, **Simon BIKINDI** ordered the *Interahamwe* in his company and to whom he gave orders, to take a group of Tutsi women that were trying to escape to Zaire behind a kiosk called Command Post and to kill them. The women were killed with UZI guns behind the Command Post. Shortly thereafter **Simon BIKINDI** remarked, "See where we are now with the Tutsis".

(c) In June 1994, **Simon BIKINDI** went to Gisenyi prison in the company of Hassan NGEZE, Major KABERA, the prison director GASIRABO and bodyguards. Reading from a list of twelve prisoners, **Simon BIKINDI** called out the names of Matabaro and Kayibanda who were each in turn hit on the back of the head with the back of an axe by **BIKINDI's** bodyguard. Matabaro and Kayibanda died as a result of the blows. Ten of the persons, whose names were on the list, all Tutsis, were killed. Apart from Matabaro and Kayibanda the other 8 prisoners were killed by the bodyguards that accompanied **Simon BIKINDI**, Hassan NGEZE, Major KABERA, and the prison director GASIRABO. The bodyguards used bayonets to kill these prisoners.

(d) At the end of June 1994, **Simon BIKINDI** established a roadblock at a scout camp near the Pentecostal church on the way to commune rouge, Gisenyi. **Simon BIKINDI** was in charge of this roadblock and the *Interahamwe* manning it. He gave the *Interahamwe* orders on what to do at that roadblock. At the roadblock several Tutsi were massacred.

(e) In early July 1994, **Simon BIKINDI** in the company of *Interahamwe* to whom he gave orders, transported three Tutsi women to the Commune Rouge where they were killed.

(f) In early July 1994, in Murara, Rubavu commune, Gisenyi, NOEL and PASCAL, two of the *Interahamwe* in **Simon BIKINDI's** company and to whom he gave orders, discovered that ANCILLA, a Tutsi women, had been hiding in the ceiling of her home,

apparently protected by her Hutu husband. **Simon BIKINDI** stated that she was one of the people fighting Hutus and that she should be taken away (killed) and was present when NOEL and PASCAL led ANCILLA away. NOEL and PASCAL killed the women and her 4 year old daughter and buried them in a shallow grave.

(g) In June 1994, in Rugerero sector, Rubavu commune, Gisenyi prefecture, **Simon BIKINDI** ordered the *Interahamwe* to kill all Tutsis in Nyamyumba commune, and specifically ordered the killing of KABAYIZA, a Tutsi man staying in Kivumu sector, Nyamyumba commune as well as father GATORE Thadee and two other priests whose names are unknown. **Simon BIKINDI** told the group of *Interahamwe* that he himself was going with them to Nayamyumba to kill the Tutsis in that commune. Simon BIKINDI, Colonel BUREGEYA, NOEL, one of the *Interahamwe* in **Simon BIKINDI's** company and to whom he gave orders, and a group of *Interahamwe* left to Nyamyumba. Upon their return, NOEL reported to the other *Interahamwe* who were left behind that they had exterminated all Tutsis in Nyamyumba.

60. During the period 1990 to 1994. **Simon BIKINDI** addressed public gatherings, composed, performed, recorded or disseminated musical compositions extolling Hutu solidarity and characterizing Tutsi as enslavers of the Hutu. These compositions were subsequently deployed in a propaganda campaign to target Tutsi as the *enemy*, or as *enemy accomplices*, and to instigate, incite, and encourage the Hutu population to separate themselves from the Tutsi, to commit acts of violence against them and to kill them. **Simon BIKINDI** composed, wrote, performed, recorded, and disseminated musical compositions and addressed public gatherings as set out above with the specific intention of instigating persecution of all Tutsis, and of Hutus opposed to ethnic division. The basis of responsibility for the deployment of his compositions is Article 6(1) of the Statute for aiding and abetting the persecution of Tutsis, through his songs that assimilated all Tutsis as the enemy, by blaming the enemy for the problems of Rwanda, by continuously making references to the 1959 revolution and its gains by the *rubanda ngamwinshi,* and by finally supporting the Hutu ten commandments.

Simon BIKINDI intended to commit the acts above, this intent being shared by all other individuals involved in the crimes perpetrated

(iii)The 1994 Massacres and Violence in Rwanda

61. In the period between 1 April and 31 July 1994, and particularly following the death of President Habyarimana in a plane crash on 6 April 1994, widespread and systematic killings targeting Tutsis occurred throughout Rwanda. In addition,

many Tutsis in different parts of Rwanda were raped and subjected to other acts of sexual violence during wholesale attacks targeting Tutsis.
In the period between April and 17 July 1994,the Interim Government, including the President(Theodore Sindikubwabo), the Prime Minister (Jean Kambanda), Ministers, civil administrators and political and local leaders including Simon BIKINDI espoused, planned, constituted, pursued, and/or strategy of destruction of the civilian Tutsi population. They made statements during public meetings and over the radio, mainly Radio Rwanda and RTLM, inciting the Hutu population to hunt down Tutsis and eliminate them. They blamed the Tutsis for being responsible for the death of President Habyarimana and for being the "enemies" of Rwanda, and called upon the army (FAR), members of the presidential guard, *gendarmerie nationale, prefets, bourgmestres , communal police, conseillers de secteur,* administrative personnel, *Interahamwe,* militias, and the entire Hutu population to eliminate Tutsis.

62. Simon BIKINDI participated in the recruitment, and military training of *Interahamwe* militias, and as a result between April and mid July 1994, massive and widespread killings and acts of violence against innocent civilians took place throughout Rwanda and in particular in the prefecture of Kigali-ville and Gisenyi prefectures.

63. These killings and acts of violence were carried out mainly by the army (FAR), members of the presidential guard, gendarmerie nationale, prefets, bourgmestres, communal police, conseillers de secteur, administrative personnel, *interahamwe,* militias and the Hutu population on the orders, directives, incitement instigation, and/or with the assistance and support of the Interim Government. In the prefectures of Kigali-ville and Gisenyi Simon BIKINDI along with Callixte NZABONIMANA, Juvenal HABYARIMANA, Joseph NZIRORERA, Andre NTAGERURA, Theoneste BAGOSORA, Mathieu Ngirumpatse, *interahamwe* leaders, including Robert KAJUGA Georges RUTAGANDA and other persons responsible for media programming and operations, including though not limited to Jean-Bosco BARAYAGWIZA, Ferdinand NAHIMANA, Joseph SERUGENDO and Felicien KABUGA led the massacres.

64. The death toll in the whole of Rwanda is estimated at approximately one million and in addition to these deaths, many Tutsis in different parts of Rwanda were displaced from their homes and sought refuge in neighbouring countries including Congo, Burundi, Tanzania and Uganda.

D: PROSECUTOR'S CASE THEORY

(i) General theory

65.. The Prosecutor's case theory is that **Simon BIKINDI** and the persons named in this indictment participated in the planning, preparation and/or execution of a joint common criminal enterprise, purpose, strategy or scheme of destruction of

Tutsis that was espoused, orchestrated, pursued and/or implemented throughout Rwanda by the Interim Government of 9 April 1994.

66. Besides the killings, all other crimes alleged in the Indictment were either actions within the joint criminal enterprise, or were a natural or reasonably foreseeable consequence of the joint criminal enterprise in which **Simon BIKINDI** participated.

67. **Simon BIKINDI** associated with a joint criminal enterprise of killing Tutsis and positively participated and supported the joint criminal enterprise. He did not extricate himself from it and left Rwanda only in mid July 1994, with the collapse of the genocidal regime.

68. The Prosecutor will adduce evidence to demonstrate that the scale, scope and systematic nature of the massacres and violence targeting Tutsis that took place in Rwanda between April and July 1994, and more specifically, in the prefectures of Gisenyi and Kigali-Ville, necessitated a strategic and coordinated campaign of destruction at the national level.

69. **Simon BIKINDI** was present at or in the vicinity of various massacre sites/scenes. He knew that widespread and systematic killings targeting Tutsis were taking place throughout Gisenyi and in Kigali Prefecture. He did not take action to prevent or oppose the massacres. As a person in authority, his failure to take action amounts to tacit encouragement of the killings and other acts of violence.

70. Moreover, the Prosecutor alleges that **Simon BIKINDI**, administrative authorities and military officials in Gisenyi and Kigali prefecture, were engaged in the war against RPF and supported the Government in the pursuance or fulfillment of the war efforts and the commission of crimes associated with that war. **Simon BIKINDI** directly participated in the commission of the crimes alleged in the indictment, including by participating in the characterization of Tutsis without distinction as the enemies of Rwanda or the accomplices of the RPF.

71. **Simon BIKINDI** publicly instigated the elimination of Tutsis as the "enemies" of Rwanda, or justified the elimination of Tutsis as a means of removing possible support for the RPF from within Rwanda, or as reprisal or vengeance against RPF military incursions. In support of the war effort, **Simon BIKINDI** armed, supported, instigated and/or mobilized, among others, the Army, *Interahamwe* and/or civil defense to eliminate Tutsis as the enemy and/or possible supporters of the RPF.

(ii) Individual Criminal Responsibility Under Article 6(1)

72. **Simon BIKINDI** is charged with individual criminal responsibility under Article 6(1) of the Statute, in relation to the six crimes charged in the Indictment.

73. Article 6(1) of the Statute provides that 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 Statute shall be individually responsible for the crime. This provision is similar to Article 7(1) of the ICTY Statute.

74. In the following paragraphs, the Prosecutor highlights his theory of the case and makes proposals on the theories of construction and interpretation of the different modes of participation embodied in Article 6(1) of the Statute.

75. Notwithstanding the theories of liability suggested by the Prosecutor, it is submitted that the Trial Chamber as a tier of fact and law, is entitled to apply any theory it finds applicable on the basis of the facts of the case. The Prosecutor submits that notwithstanding his theory of liability, the Trial Chamber is entitled to find an accused guilty if it determines that he participated in a crime through any form of *participation* enumerated in Article 6(1), or encompassed in the intent, object and purpose of the Statute, namely to bring to justice all persons responsible for genocide and other serious transgressions of international humanitarian law. The Prosecutor hereby puts the Defense on further notice through the pleading of Article 6(1) that any one or more of the theories of direct responsibility may apply.

76. The Prosecutor submits that the provisions of Article 6(1) should be construed purposively and not narrowly with a view to achieving and implementing the objects and purposes of this article.[6] The Appeals Chamber has underscored the purposes underlying the provisions of Article 7(1) of the ICTY Statute which is similar to Article 6(1) of the Statute of this Tribunal, holding that a narrow construction of the particular actions contained in Article 7(1) is inconsistent with the intent of the Statute to "extend the jurisdiction of the International Tribunal to all those *responsible* for serious violations of international humanitarian law.[7]

77. In the same context, the Prosecutor submits that in construing the various modes of participation in Article 6(1), the Trial Chamber should be guided by the principle of law that all those who contribute to the commission of crimes stipulated in the Statute incur criminal liability, and this is not limited only to those persons who *directly* or *physically* commit the crimes,[8] but must extend to all those persons, especially those in authority as **Simon BIKINDI**, who by virtue of their actions or inactions (omissions), allowed, enabled, assisted, or facilitated the commission of those crimes.

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[6] In construing the Statutes of the Tribunals, the Appeals Chamber has on a number of occasions pursued a purposive approach, wherein it has sought to establish the object and purpose of the provisions of the Statute as opposed to narrow construction. See e.g. *Tadic* Appeals Chamber Judgment, para. 189

7.Tadic A.C Judgment para 189

[8] Celebici T.C Judgment para 319

78. It is in this same spirit, as articulated in the preceding paragraphs, that the Appeals Chamber has emphasized that the modalities of participation not explicitly referred to, such as common or joint criminal enterprise/purpose, are included within the meaning of Article 6(1) or 7(1).[9] The Appeals Chamber has concluded as follows:

> "[The] Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common criminal purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons[10]."

79 It is submitted that to establish criminal culpability of the accused under Article 6(1), the Prosecutor has to demonstrate that (a) the accused participated in the commission of the crime(s), i.e. that his or her conduct contributed to the commission of the crime(s); and (b) that the accused participated or contributed to the commission of the crime(s) with the requisite knowledge or intent[11].The Prosecutor submits that the accused's participation need not cover cumulatively all the five different forms and/stages of participation in the commission of crimes stipulated in Article 6(1), but that any one or more of them will suffice[12].

(iii) Definition of the Different Modes of Participation Under Art. 6(1)

80. The Prosecutor construes the nature and content of the *actus reus* and *mens rea* required for holding an accused individually criminally responsible under Article 6(1) for having "planned", "instigated" "ordered" "committed" or otherwise "aided and abetted" the offences alleged in the Indictment as follows:

a. Planning

81. "Planning" occurs when one or more persons contemplate and take any steps towards the commission of a crime. This form of participation therefore means that the accused either alone or jointly designed or organized the commission of a crime. [13] The *actus reus* of the crime may be executed by persons other than the accused who planned it, although it has to be established that the crime was

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[9] Tadic A.C Judgment para 190 Baglishema T.C Judgment para 27, Kayishema & Ruzindana T.C Judgment para 203,204 Celebici T.C Judgment para 328

[10] Tadic A.C Judgment para 190

[11] Ruzindana &Kayishema T.C Judgment para 198

[12] Akayesu T.C Judgment para 473 Kayishema & Ruzindana T.C Judgment para 194-197 &Celebici Judgment para 321

[13] Gacumbitsi Judgment T.C., para. 271; Akayesu T.C Judgment para 480. Blaskic T.C Judgment para 278

executed in furtherance of the plan. Besides direct evidence, the existence of a plan may be established from circumstantial evidence[14].

82. With respect to the criminal intent, the accused must have intended directly or indirectly that the crime in question be committed, or he or she must have been aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct[15].

b. Instigating

83. This form of participation involves prompting, provoking or otherwise inducing another to commit an offence[16]. The *actus reus* of the crime may be committed by one or more persons other than the accused.

84. Instigation may be executed by both express and implied conduct, and the notion is "sufficiently broad to allow for the inference that both acts and omissions may constitute instigation.[17]"

85. Instigating need not be direct or public, as required for direct and public incitement to commit genocide, punishable pursuant to Article 2(3) of the Statute. Prosecutor has to prove a causal relationship between the instigation and the fulfillment of the *actus reus* of the crime or the physical perpetration of the crime[18] to establish the "causal" link, the Prosecutor need not demonstrate that the crime would not have occurred without the accused's involvement; it is sufficient if it is shown that the accused's conduct was a clear contributing factor to the conduct of other persons[19]. Therefore proof is required of a causal connection between the instigation and the *actus reus* of the crime.[20]

86. The accused must have possessed the criminal intent, that is he or she must have directly or indirectly intended to provoke or induce the commission of the crime in question, or he or she must have been aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.[21]

c. Ordering

87. Under Article 6(1), "ordering" involves the accused giving orders to persons under his authority to commit crimes with or without the participation of the

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[14] Blaskic T.C Judgment para 279
[15] Kvocka T.C Judgment para 251
[16] Kvocka T.C Judgment para 243,Blaskic T.C Judgment para 280, Kristic T.C Judgment para 601
[17] Blaskic T.C Judgment para 279
[18] Blaskic T.C Judgment para 278
[19] Tadic T.C Judgment para 688, Kvocka T.C Judgment para 252, Celebici T.c Judgment para 327
[20] Gacumbitsi Judgment T.C., para. 279; Semanza Judgment T.C., para. 381; Akayesu Judgment A.C., paras. 478 to 482. There is authority to suggest that no proof of a casual link is required under Rwandan law between the instigation and commission of the crime.
[21] Kvocka T.C Judgment Parapara 251

accused in the physical execution of those crimes[22]. Ordering does not require a formal superior-subordinate relationship but it must be established that the accused possessed the authority to order.[23]

88. It is not necessary that the order be given in writing or any particular form. Therefore the order may be explicit or implicit[27]. The fact that the order was given can be proved through circumstantial evidence. In addition, an order need not be given by the superior (accused) directly to the persons physically executing the *actus reus* of the offence, but may be transmitted by others in the chain of command.[24]

89. It must be proved that the accused possessed the *mens rea* of the crime ordered or must have acted in awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his order.[25]

d. Aiding and Abetting

90. "Aiding and Abetting" which are forms of accomplice liability, involve the provision of practical assistance, encouragement or moral support that has a substantial effect on the perpetration of the crime.[26] Aiding means assisting or helping another to commit a crime whereas abetting means facilitating, advising, or instigating the commission of a crime. [27]

91. The assistance given, however, need not constitute an indispensable element, i.e. a *conditio sine qua non*, of the acts of the perpetrator[28]. In addition, the *actus reus* of aiding and abetting may be perpetuated through an omission.[29]

92. Further, participation in crimes by way of aiding and abetting does not require actual physical presence of the accused at the scene of the crime, nor physical assistance, and the assistance need not be provided at the same time that the crime is committed[30]. A person may aid and abet a crime through a variety of contributions, in the form of practical assistance, encouragement or moral support.[31] (Mere encouragement, moral support by the accused aider or abettor, or merely being "concerned with" the crimes, may amount to assistance.[37])

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[22] Akayesu T.C Judgment para 483,Blaskic T.C Judgment para 281,Krstic T.C Judgment para 601
[23] Kordic Trial Judgment, para. 388; Semanza Judgemnt A.C. para. 359-364
[24] Akayesu T.C Judgment para 483,Blaskic T.C Judgment para 281,Krstic T.C Judgment para 601
[25] Kvocka T.C Judgment para 251
[26] Baglishema T.C Judgment paras 32-33, Kvocka T.C Judgment para 253,Kunaraca T.C Judgment para 391,Akayesu T.C Judgment para 484,Furundzija T.C Judgment para 249.
[27] Gacumbitsi Judgment T.C., para. 286; Ntakirutimana Judgment T.C., para. 787, Akayesu judgment T.C., para. 484; Kajelijeli Judgment T.C., para. 765
[28] Baglishema T.C Judgment para 33,Furundziga T.C Judgment para 209,Blaskic T.C Judgment para 285,Aleksovski T.C Judgment para 61,Furundziga T.C Judgment para 233
[29] Blaskic T.C Judgment para 284.
[30] Tadic T.C Judgment para 687,Baglishema T.C Judgment para 33,Akayesu T.C Judgment para 484
[31] Tadic Appeal Judgment para 229; Aleksovski Appeal Judgment, para. 16

93. With respect to the criminal intent, the accused must have acted with knowledge that his or her acts or omission would assist or facilitate the commission of the crime by the principal. It is not necessary, however, that the aider and abettor "should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor. [32] The prosecutor submits that the proof of "knowledge" as the *mens rea* for aiding and abetting is only a minimum threshold for establishing accomplice liability.

e. Committing

94. "Committing" covers not only situations where the accused either alone or jointly with others physically performs all the requisite elements of the *actus reus* of the crime, but where the accused engenders a culpable omission in violation of criminal law.[33] The principles of a common criminal plan, design or purpose, i.e., joint criminal enterprise, articulate a mode of individual criminal responsibility encompassed by Art. 6(1) of the Statute, in which one person can be criminally responsible for the acts of another where both participate, with shared intent, in the joint criminal enterprise to commit a crime under the Statute. Similarly Rwandan law also envisaged individual criminal responsibility for conduct beyond commission of the underlying *actus reus* of the alleged crimes.[34] This is consistent with Tribunal jurisprudence on liability for participation in a joint criminal enterprise as a form of "commission".[35]

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[32] Tadic A.C Judgment para 229,Kvocka T.C Judgment para253,Furundziga T.C Judgment para 246,249

[33] Alesksovski A.C Judgment paras 162-164,Tadic A.C Judgment para 188,Musema T.C Judgment para 123,Baglishema T.C Judgment para 29,Krstic T.C Judgment para 601,Kvocka T.C Judgment para para 243,Kordic T.C Judgment para 364

[34] See Rwandan Code Penal, 18 aout 1977 – Decret-Loi No.21/77, Articles 89-91 & 257; Chapter V of the Rwandan Penal Code identifies five areas that impose individual criminal responsibility beyond the commission of the actus reau of the underlying crime, envisaged in Article 6(1) of the Statute:

- Persons who give incentives to others to commit crimes, for example by promises, gifts, threats, use of their authority to office, or by attending meetings, providing instructions or forcing others to commit crime;
- Persons who provide weapons or all other means used to commit crimes, having provided them with the knowledge that the weapons will be used to commit crimes;
- Persons who aid or assist the perpetrator to commit to commit a crime in planning or facilitating the said crime or in executing the crime, with the knowledge that the perpetrators were committing the crime;
- Persons who instigate/incite the commission of the crime using speeches, public threats, meetings, written statements bought or paid for, or freely given; the acts or omissions are also punishable for provocative acts even if the provocation has no effect or no crime was committed as a direct or indirect result of the provocation;
- Accessories after the fact who give refuge to, or assist criminals evade the law, contrary to Article 257 of the Penal Code. [Uncertified Translation]

[35] See *Prosecutor v Odjanic* A.C. Decision on Motion Challenging Jurisdiction-Joint Criminal Enterprise 21 May 2003 paras. 21& 41 where the Appeals Chamber held that the law providing for accomplice liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and

95. The accused must have possessed the *mens rea* of the relevant crime, or he or she must have been aware of the substantial likelihood that a crime would occur as a consequence of his/her act or omission[36].

f. Joint Criminal Enterprise or Common Criminal Plan or Purpose

96. As noted above, in addition to the above modes of participation, the jurisprudence of the ICTR (and the ICTY) recognizes that participation in Article 6(1) includes modes of participating in commission of crimes which occur where a plurality of persons having a common criminal purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.[37]

97. Under this form of participation, all those who contribute to the commission of crimes in execution of a common criminal purpose are criminally liable as co-perpetrators. The jurisprudence of the ICTR (and ICTY) recognizes *collective criminality* through participation in a joint criminal enterprise. The Appeals Chamber in the *Tadic* case recognized that for crimes committed by groups of individuals, individual liability for each co-perpetrator could be established on the grounds that collectivity is a recurrent characteristic of crimes commonly committed during wartime.

98. The Appeals Chamber in the *Tadic* case has explained the rationale for its finding that participation in Article 7(1) of the Statute of the ICTY (similar to Article 6(1) of the ICTR Statute) encompasses participation in a joint criminal enterprise. It also has explained the rationale for the position that in general all participants in a common criminal enterprise, including those who do not physically perpetrate the criminal act (e.g. murder or rape), are criminally liable as co-perpetrators. The Appeals Chamber has stressed that this interpretation,

> [...] is not only dictated by the object and purpose of the Statute, but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time, these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities...), the participation and contribution of the other members of the group is often vital in facilitation of the commission of the

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that such person must have been able to foresee that he could be held criminally liable for his actions if apprehended; see also Prosecutor v Stakic T.C. paras. 431-442, applying the reasoning in Odjanic. Ipso facto. Mpambara would have been culpable under Rwandan law at the time of commissionof the alleged offences.

[36] Tadic A.C Judgment paras 185-186,Kordic T.C Judgment paras 364 & 373

[37] Tadic A.C Judgment para 190,Kayishema &Ruzindana T.C Judgment paras 203-204,Celibici T.C Judgment para 328

> offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from those actually carrying out the acts in question. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role of co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon circumstances, to hold the latter only as aiders and abettors might understate the degree of their criminal responsibility.[38]

99. There are three basic objective requirements of this form of participation that must be proved.

100. First, it must be proved that two or more individuals were, in one way or the other, involved together in the commission of a crime within the jurisdiction of the Tribunal. These persons need not be organized in military, political or administrative structures.[39]

101. Second, it must be proved that there existed a common design or plan constituting or including the commission of a crime within the jurisdiction of the Tribunal. The plan, design or purpose need not have been previously arranged or formulated. The common plan or purpose "may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put in effect a joint criminal enterprise.[40]

102. Finally, it must be proved that the accused participated in the common design or plan and was thereby linked and related to the commission of the crimes within the jurisdiction of the Tribunal. The accused's participation need not involve the physical perpetration of the crime, such as murder, but may take the form of assistance in or contribution to, the execution of the common plan or purpose.[41]

103. Concerning *mens rea*, the jurisprudence of the Appeals Chamber in the *Tadic* case has found that it differs according to three categories of collective criminality that fall within the doctrine of common criminal purpose.

Categories of Joint Criminal Enterprise

104. During the course of the trial, the Prosecutor will adduce evidence that speaks to all the categories of joint criminal enterprise enumerated above. As submitted above, despite the Prosecutor's theory of the case under this category of criminal participation, the Trial Chamber as a trier of fact and law is entitled to adopt a theory it deems applicable on the basis of the evidence adduced. Following is an

[38] Tadic A.C Judgment para 190-192
[39] Tadic A.C Judgment para 227(i)
[40] Tadic A.C Judgment para 227(ii)
[41] Tadic A.C Judgment para 227(iii)

overview of each category of joint/common criminal enterprise. This provision lists the the form of criminal conduct which, provided all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute. A mirror provision is found in Article 7(1) of the ICTY Statute. The ICTY Appeals Chamber has previously held that the mode of liability identified under Article 7(1) of the ICTY Statute include participation in a joint criminal enterprise as a form of "commission" under that Article. In the jurisprudence of the ICTY three categories of joint criminal enterprise have been identified as having the status of customary international law. The first category is a **"basic"** form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, posses 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. The second category is a **"systematic"** form of joint criminal enterprise. It is a variant of the basic form, characterized by the existence of an organized system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise. The third category is an **"extended"** form of joint criminal enterprise. It 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 executing that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun point members of one ethnicity from their town, village or region(to effect "ethnic cleansing")with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gun point might well result in the deaths of one or more of these civilians.[42]

a. Same Criminal Intention

105. The first category includes those cases where all perpetrators, acting pursuant to a common design, possess the same criminal intention, for instance, the formulation of a plan to kill, although their methods of participation may differ. Under this category, it has to be proved that the accused intended to commit a crime, this intent being shared by all other individuals involved in the crime being perpetrated.[43]

106. In elaborating this category of joint criminal enterprise, the *Tadic* Appeal Judgment, for instance, cited the *Einsatzgruppen* Judgment where the Nuremberg Tribunal held that guilt for murder is not restricted to the person who pulls the trigger or buries the corpse. It found:

[42] Gerard Ntakirutimana A.C Judgment paras 15-18
[43] Tadic A.C. Judgment para 228

> Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime.[44]

107. In cases where a participants did not, or cannot be proved to have physically carried out the *actus reus* of the common plan (e.g. the killing), there are two objective and subjective prerequisites for imputing criminal responsibility to such participant: (a) the accused must voluntarily participate in one aspect of the common design (e.g., by inflicting a non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators; and (b) the accused, even if not personally carrying out the killing, must nevertheless intend the result[45].

b. Acting Pursuant to a Concerted Plan

108. The second category, essentially a variant of the first, involves accused participating in a concerted plan or system, such as a system of ill-treatment or repression. The Appeals Chamber has described this category as embracing so-called "concentration camp" cases.[46]

109. Invoking decisions of the World War II military courts, the Appeals Chamber has held that the notion of common criminal purpose was applied to instances where the offences charged were alleged to have been committed by members of military and administrative units, such as those running concentration camps, i.e. by groups of persons acting pursuant to a concerted plan. The Appeals Chamber has held that in these cases:

> [...] the required *actus reus* was the active participation in the enforcement of a *system of repression,* as it could be inferred from the position of authority and the specific functions held by each accused.[47]

110. The notion "active participation" above has been defined to include encouraging, aiding and abetting or in any case participating in the realization of the common criminal design.[48]

111. The Appeal Chamber noted that the *mens rea* element comprised (a) knowledge or awareness of the system, and (b) the intent to further the common concerted design of ill-treatment.[49] The Appeals Chamber emphasized that in these cases

[44] Tadic A.C Judgment para 200
[45] Tadic A.C Judgment para 196
[46] Tadic A.C Judgment para 202
[47] Tadic A.C Judgment para 203
[48] Tadic A.C Judgment para 202
[49] Tadic A.C Judgment para 203

the requisite intent could also be inferred from the position of authority held by the camp personnel.

c. Foreseeable Conduct outside the Common Design

112. This category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design was nevertheless a natural and foreseeable consequence of the effecting of that common purpose[50].

113. The Appeals Chamber has provided the example of a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town (that is to effect "ethnic cleansing") in the course of which one of the victims is shot and killed. The Appeals Chamber has explained that in such a scenario, although perhaps murder was not an explicit part of the common design, it was certainly foreseeable that forcible removal of civilians at gunpoint from their homes might well result in the death or more of those civilians.[51]

114. Criminal responsibility, noted by the Appeals Chamber, "may be imputed to all participants within a common criminal enterprise where the risk of death occurring was both a predictable consequence of the execution of the criminal design and the accused was either reckless or indifferent to that risk.[52]

115. In conclusion, to establish criminal responsibility under this category, it needs to be proved that (a) the accused intended to participate in a common criminal design, and (b) the foreseability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.[53]

(iv) Article 6(1) Applied to the Facts of the Case

116. On the basis of the contents of the different forms of participation in Article 6(1) as described above, the Prosecutor will seek to prove **Simon BIKINDI**'s participation within the meaning of Article 6(1) and thus establish his criminal culpability under the same article as follows: This provision lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute.

a. Participation in a Joint or Common Criminal Enterprise

[50] Tadic A.C Judgment para 204
[51] Tadic A.C Judgment para 204
[52] Tadic A.C Judgment para 204
[53] Tadic A.C Judgment para 206

117. The Prosecutor will establish the criminal culpability of **Simon BIKINDI** through his participation in a joint or common criminal enterprise to eliminate Tutsis.[54]

118. As noted in the factual allegations above, the Prosecutor will lead evidence to prove that between 6 April and 17 July 1994, **Simon BIKINDI** directly participated in *and* substantially contributed to the realization of a common criminal enterprise, scheme or purpose of eliminating Tutsis. The Prosecutor will prove and demonstrate that this criminal enterprise was constituted, orchestrated, espoused, implemented and/or executed by the 1994 Rwandan leadership, including the government of the day.

119. Besides the killing of Tutsis, all other crimes alleged in the Indictment were either actions within the joint criminal enterprise, or were a natural or reasonably foreseeable consequence of the joint criminal enterprise in which Simon BIKINDI participated. Applying factors identified in the *Milutinovic* Decision the indictment contains the underlying material facts relating to the joint criminal enterprise, namely the time frame, the Participants, the role of the accused and the purpose of the enterprise.[55]

120. Furthermore, the Prosecutor will lead evidence demonstrating the execution of the criminal enterprise of Simon BIKINDI eliminating Tutsis with other members of the local administration and security services in Gisenyi and Kigali prefectures. These include Head of State Juvenal Habyarimana, Minister of youth and sports Callixte Nzabonimana, National *interahamwe* leaders Robert Kajuga, ColBUREGEYA and NOEL, LtCol Anatole NSENGIYUMWA, Pascal, Jean Kavunderi, CARL SELAMANI, KABULIMBO, SENDEGEYA, Paulin, NOKORI, Members of his ballet including SERUMVERI Bosco and DUSENGIMANA Kizito, National MRND political leaders, such as Mathieu NGIRUMPATSE Andre NTAGERURA, Joseph Nzirorera, Hassan NGEZE Major Kabera, and MRND aligned military leaders, such as Theoneste Bagosora and Georges Rutaganda, to militarize the MRND *interahamwe* youth wing and to indoctrinate *interahamwe* militias with anti tusi ideology and to disseminate anti tutsi propaganda. Simon BIKINDI collaborated in a joint criminal enterprise with Ferdinand Nahimana, Jean Bosco BARAYAGWIZA, Felicien KABUGA, Joseph SERUGENDO and launched anti-tutsi propaganda to eliminate them.

121. The Prosecutor submits that on the basis of the law relating to the attribution of criminal responsibility to persons participating in a joint criminal enterprise, the Trial Chamber would find Simon BIKINDI responsible for the crimes with which he is charged, not only where he physically carried out the killing of Tutsis, and other acts of violence, or where he ordered or instigated crimes, but also where

[54] The Prosecutor has pleaded this form of participation in various paragraphs of the indictment including 3,7-9,12,13,16-20,22,24-29,31-42,44-46,48.In addition to the participation of the accused specified in the paragraphs cited, his other. specific contribution or participation in the joint criminal enterprise is also contained in the discussion that follows in this pre-trial brief.

[55] Gerard Ntakirutimana A.C Judgment para 13

these criminal acts were carried out by other members of the common criminal enterprise to further the purpose of the common enterprise.

122. In the latter scenario, the Prosecutor submits that Simon BIKINDI facilitated the criminal activities of his co-perpetrators in the common criminal enterprise and thus intended the crimes to be committed. Simon BIKINDI's conduct (including acts and omissions), made it possible for the perpetrators to physically carry out the massive and systematic killings and other acts of violence targeting Tutsis. Alternatively, without prejudice to the foregoing, Simon BIKINDI intended to participate in the criminal activities of his co-perpetrators and the crimes were a natural/predictable consequence of the execution of the criminal design and he was either reckless or indifferent to that risk.[56]

123. Simon BIKINDI by his statements and actions was anti-Tutsi and anti-Arusha Accords, consistent with the policy of the government in power, which opposed power-sharing with the Rwanda Patriotic Front ("RPF") under the Arusha Accords alleging that it would constitute a reversal of the 1959 revolution and reinstate "Tutsi dominance." Simon BIKINDI associated all Tutsis with RPF and launched a campaign to destroy them.

124. Between 6 April and 17 July 1994, Simon BIKINDI participated in the formulation and/or supported the adoption and implementation of various directives, decisions, policies, orders, etc, to further the common criminal purpose of eliminating Tutsis. Local authorities, including *prefets*, *bourgmestres*, *conseillers* and *responsables de cellule, Interahamwe*, the civil defence, FAR, gendermerie and the Hutu population were mobilised to carry out the common criminal purpose of killing Tutsis.

125. In furtherance of the common criminal purpose of eliminating Tutsis, Simon BIKINDI participated directly in perpetrating massacres, in planning or organizing the massacres in diverse locations, in ordering and publicly instigating militiamen, local authorities, soldiers, gendarmerie and the Hutu population to eliminate Tutsis, and in aiding and abetting the massacres through *inter alia* the training and arming of militiamen to eliminate Tutsis.

126. Although Simon BIKINDI knew that throughout Rwanda, Tutsi civilians were being targeted and systematically and massively killed on ethnic grounds, he did not publicly disavow the killings, thereby demonstrating his support for the massacres.

b. Physical or Direct perpetration of the Crimes and/or Aiding and Abetting in their commission

[56] Tadic A.C Judgment paras 190-229 and the Prosecutor's submissions regarding joint criminal enterprise as a form of participation under Article 6(1) above

127. The Prosecution will adduce evidence to prove that Simon BIKINDI physically committed and/or aided and abetted in the commission of crimes with which he is charged, and accordingly establish his individual criminal culpability within the meaning of Article 6(1) of the Statute of the Tribunal.

128. As alleged in the indictment, Simon BIKINDI participated in the physical commission of crimes and in aiding and abetting in the commission of the same crimes by others .Simon BIKINDI's participation in some of the crimes, for instance, the training and arming of the civilian youth who killed Tutsi civilians, began prior to April 1994 and continued throughout the period of the genocide.

129. In summary, in support of the prosecution's case at trial, evidence will be adduced against Simon BIKINDI as per the factual allegations in the indictment against him as reproduced in Part C above.

c. Participation in Plans to Kill Tutsis, Ordering and Instigating massacres and other acts of violence against Tutsis

130. As alleged in the Indictment, on specific dates and at specific locations, Simon BIKINDI participated in meetings where it was agreed that Tutsis should be killed. He accordingly ordered and instigated the killing of Tutsis, supporting similar criminal conduct by others, including local authorities, the military and gendarmerie and the militia.

d. Legal Duty-Omission Conception, Participation by Omission, Criminal Negligence

131. In addition, without prejudice to the above, the Prosecutor will establish Simon BIKINDI's criminal culpability under Article 6(1), relying on the legal-duty-omission conception, and thus establish his guilt for criminal negligence.

132 Alternatively and without prejudice foregoing, arising from Simon BIKINDI's failure to prevent or punish crimes in breach of a legal duty, the Prosecutor submits that such culpable omission should be viewed as a form of participation. His culpable omission may be viewed as a form of tacit encouragement, aiding and abetting[57]. In the *Akayesu* Judgment, it was held that Akayesu's failure to oppose the killings in light of his authoritative position constituted a form of tacit encouragement, with the attendant criminal culpability under Article 6(1) of the Statute.[58]

[57] Musema T.C Judgment para 123,Kvocka T.C Judgment para 243,Krstic T.C Judgement para 601,Tadic A.C Judgment para 188, Kunarac T.C Judgment para 390.Baglishema Judgment (See Judge Guney's dissent,A

[58] Akayesu T.C Judgment para 705.

133. The Prosecutor submits that Simon BIKINDI held a position of authority and responsibility, and had a duty under law to take steps to prevent or punish genocide and massive transgressions of international humanitarian law perpetrated in Rwanda during 1994 and for which he is indicted. He failed in his duty and must incur criminal liability. His failure to discharge a legal duty constituted participation within the meaning, object and purpose of Article 6(1) as elaborated above.

134. In the following paragraphs, the Prosecutor establishes the existence of a legal duty on Simon BIKINDI arising under international law, and the recognition of individual criminal liability punishable under international law for failure to discharge that duty. As argued in the alternative, failure to take action to prevent or punish massive and systematic crimes in breach of that legal duty, should be construed as tacit encouragement, aiding and abetting of the crimes.

135. First, concerning genocide crimes under the Statute of the Tribunal, the Prosecutor submits that international law imposes a duty on persons in authority to prosecute persons responsible for the crimes, failure of which amounts to breach of duty in violation of international criminal law.

136. The Statute of the ICTR codified genocidal crimes verbatim from the Genocide Convention, and thus one purpose or intent of the Statute must, *inter alia*, be seen in the context of enforcing the Genocide Convention.

137. The Genocide Convention creates an absolute duty on states parties to prosecute persons responsible for genocide. In other words persons in authority are under an international law duty to punish those committing genocide under their national laws. The Genocide Convention stipulates this obligation in absolute terms, providing that "persons committing genocide or any other acts enumerated in article 3, *shall be punished* whether they are constitutionally responsible rulers, public officials or private individuals.[59]

138. Under Article 5, the Genocide Convention obligates states parties to provide effective penalties for persons guilty of genocide. In construing the meaning of Article V of the Convention, the Sub-Commission on Prevention of Discrimination and Protection of Minorities has underscored the absolute duty of states, and thus those constituting governments. The Commission has found that pursuant to Article 5, "the Contracting States *must* enact the necessary legislation to give effect to the provisions of the Convention, and, in particular, to provide effective penalties for persons guilty of genocide.[60]

139. The Prosecutor submits that failure of the State (and thus failure of those in authority) to punish genocide constitutes an international crime. While the matter

[59] Article 4 of the Genocide Convention

[60] Resolution 1994/11 0f 24 August 1994 on Strengthening the prevention and punishment of the crime of genocide.

before this Tribunal is not an indictment of the state or a state organ, the Prosecutor submits that some aspects governing state responsibility[61] in international law provide insights on the matter before this Tribunal, *viz*, the individual criminal culpability of persons in authority for failure in their duties under the Genocide Convention.

140. Under the law of state responsibility, there is an international wrongful act of a state when conduct consisting of an *action* or *omission* is attributable to the state under international law, and that conduct constitutes a breach of an international obligation of the state.[62] Under international law, some internationally wrongful acts or omissions constitute international crimes. In this regard, international law singles out wrongful acts or omissions, which result from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.[63] The failure of the state to prevent or punish genocide falls under this category. Thus, the International Law Commission has found that an international crime may result, *inter alia*, from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, *genocide*, apartheid."[64] The Rwandan Interim Government of 1994 was clearly in breach of an international obligation constituting an international crime under international law.

141. It is now a settled principle of international criminal law that its enforcement will not be prevented by the veil of statehood. Such veil will be lifted to bring those who commit crimes to justice. In rejecting the Defense argument that international law is concerned with individuals and where an act in question is an act of the state those who carry it out are not personally responsible, the Nuremberg Court held that crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[65]

142. The Prosecutor submits that where persons in positions of authority physically perpetrate crimes and also wantonly fail in their legal duty to punish the perpetration by others, of criminal acts, they are accountable. Simon BIKINDI's failure to take action in the circumstances described in the indictment, amounted to criminal negligence. Alternatively, the dereliction amounted to tacit encouragement of the crimes or aiding and abetting.

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[61] See International Covenant on civil and political rights of 1966 and the Inter-American Convention on Human Rrights(Under the Inter-American Convention on Human Rights)

[62] Article 3 of the International Law Commission's draft Articles on state responsibility (1996) reprinted in in D.J Harris, Cases and Materials on International law, 5th edition (1998), 485 ff Italicization added.

[63] Article 19 of the International Law Commission's Draft Articles on State Responsibility (1996)

[64] Article 19 (c) of the International Law Commission's Draft Articles on State Responsibility (1996)

[65] Decision of the International Military Tribunal at Nuremberg Oct 1946 International Law Reports 203

143. Rwanda acceded to the Genocide Convention of 1949 by legislative decree on February 12, 1975. This meant that Rwanda was bound to enforce the Genocide Convention under its law, and as the Judges of the ICTR have held, at the time of the 1994 genocide, genocide was punishable in Rwanda.[66] No doubt, the international legal obligation of enforcing the Genocide Convention through penalizing transgressors lies upon those constituting political and military leadership. Failure in this duty constitutes criminal negligence. Genocide constitutes a crime of crimes; its commission constitutes a violation of *jus cogens*, and its proscription and punishment possesses universal jurisdiction status.

144. The post-World War Tribunals have underscored the duty of not only military leaders, but also political leaders to prevent the commission of international crimes.[67] The Prosecutor draws the attention of the Trial Chamber to the fact that some of the existing jurisprudence has approached and limited culpability under the legal-duty-omission conception discussed only to Article 6(3) superior/command responsibility. This approach seems to reject a finding of criminal responsibility for omission if a superior-subordinate relationship is not established.[68]

145. As submitted under the Prosecutor's case strategy under Article 6(3), Simon BIKINDI was a superior exercising effective control over the perpetrators of crimes, including *interahamwe*, militias, local authorities, and the Hutu population.

146. In any event, the Prosecutor submits that criminal liability based on the legal-duty-omission conception also applies under Article 6(1), including in situations where a superior-subordinate relationship is non-existent. In the *Bagilishema* Judgment, for instance, although the Trial Chamber found that the accused could not be held culpable under Art. 6(3) for a breach of a legal duty since in the Trial Chamber's view there did not exist a superior-subordinate relationship between him and the communal staff, the Trial Chamber nevertheless accepted that it is possible under some circumstances to find culpability for omission under Art.6(1) without necessarily establishing a superior-subordinate relationship. The Trial Chamber observed as follows:

> Nevertheless, in legal terms, the accused's possible breach of his duty to control staff (or persons generally) who were not his true subordinates does not come under the purview of Article 6(3). If anything, it is a matter for Article 6(1), in the event that it can be shown that the accused, although reasonably able in the circumstances to do so, omitted to punish his staff because he did not wish to obstruct their criminal behavior.[69]

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[66] Musema T.C Judgment para 152
[67] See record of proceedings of the International Military Tribunal for the far east (1946-1949) at 433-445
[68] Baglishema T.C para 142,
[68] Baglishema T.C Judgment para 168, Kayishema & Ruzindana T.C Judgment paras 206-7
[69] Baglishema T.C Judgment para 168

147. Furthermore, as it was observed in the *Akayesu* and *Kayishema & Ruzindana* Judgments, as distinguished from the duty to act (to prevent/punish crimes) imposed by the doctrine of command/superior responsibility in Article 6(3), under Art. 6(1), criminal culpability arises from the support and encouragement that might be afforded to the principals of the crime from the accused's omission[70]. The Prosecutor submits that Simon BIKINDI's omissions encouraged, supported, aided and abetted the killing of Tutsis, as described in the indictment.

e. Presence at or in the Vicinity of Crime Scenes: Tacit Encouragement of the Crimes

148. Further, the Prosecutor submits that on specific dates, Simon BIKINDI was present at scenes of crimes or in the vicinities of crimes scenes and did nothing to oppose their commission, thereby tacitly encouraging or aiding abetting the crimes.

149. The Prosecutor submits that scenes of crimes must not be construed restrictively. It must, for instance, not be limited to scenes of massacres. It must perforce include places of meetings or rallies where the planning of the crimes was carried out and places of incitement or instigation of the killings and violence against Tutsis.

150. The Prosecutor will also establish the criminal culpability under Article 6(1), of Simon BIKINDI even where he did not physically commit the crimes but for allowing the crimes to be committed in his presence, or at crime scenes close to or proximate to the accused. The Prosecutor submits that the conduct of the accused in failing to prevent or punish crimes committed under the above circumstances, or at a minimum to oppose their commission, amounted to tacit encouragement of the commission of the crimes, or a moral or official tolerance or support of the crimes, rendering the accused criminally culpable under Article 6(1).[71]

151. The Prosecutor submits that the term "presence" (at scenes of crimes) calls for a purposive interpretation. It is submitted that whereas "physical" presence of the accused at the scene of the crimes is vital, in some cases, criminal culpability may be imputed even when the accused is *absent* from the scene of the crime, as long as he/she should have been aware of the violations, but kept silent/failed to oppose or to punish the crimes.

152. In the *Aleksovski* Judgment, the Trial Chamber not only found the accused culpable due to his presence during the systematic torture of detainees, but also found him culpable for aiding and abetting the repetitious brutality *even when he was absent*. The Trial Chamber found that abuse of this kind was committed near the accused's office so often that he must have been aware of it. Yet he did not

[70] Akayesu T.C Judgment para 479,Kayishema &Ruzindana Judgment para 202
[71] Akayesu T.C Judgment para 693

oppose or stop the crimes, as his superior position demanded, and his *silence* could only be interpreted as a sign of approval. The Trial Chamber concluded that such *silence* evinced a culpable intent of aiding and abetting of such acts as contemplated under Article 7(1) of the Statute.[72]

153. The Prosecution agrees with the above approach, and submits that in addition to instances where Simon BIKINDI was physically present at crime scenes, he should be found culpable in a great number of others where he was not. The approach in the *Aleksovski* case above is appropriate. In that case, "nearness/in the vicinity" was used in the context of establishing that the accused should have been aware of the atrocities even when he was absent. Thus, what is important is knowledge of the atrocities on the part of those in positions of responsibility, yet they fail to take action to prevent or punish them, demonstrative of their intention to encourage the atrocities.

f. Silence in the Face of Systematic and Widespread Killings and Violence Targeting Tutsis

154. Further and without prejudice to the above, the Prosecutor will also establish the accused's criminal culpability under Article 6(1) even where he did not physically commit the crimes, but for his silence in the face of massive crimes in Rwanda.

155. The Prosecutor submits that by virtue of Simon BIKINDI's position and authority, his silence sent a clear signal of tolerance for such criminal acts, or constituted a sign of approval, or moral support or encouragement, attaching direct criminal responsibility under Article 6(1) as elaborated above.

(V) Criminal Responsibility Under Article 6(3) of the Statute

156. The Prosecutor charges Simon BIKINDI under Article 6(3) of the Statute with regard to the crimes of genocide, or in the alternative complicity in genocide, murder and extermination as a crime against humanity, for the criminal acts of his subordinates.

157. It is submitted that Article 6(3), similar to Article 7(3) of the Statute of the ICTY, is applicable where a superior failed to exercise his or her powers to prevent his or her subordinates from committing crimes or failed to punish them afterwards, despite the superior's knowledge that the subordinates were about to perpetrate or had perpetrated such crimes.[73]

158. The Prosecutor agrees that it is well established by the jurisprudence of the Tribunal that to establish superior responsibility under Article 6(3), the following must be proved:

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[72] Aleksovksi T.C Judgment paras 87-88

[73] Aleksovksi A.C Judgment para 76, Celibici T.C Judgment para 346, Baglishema T.C Judgment para 37 Kayishema &Ruzindana para 217

(a) That there exists a superior-subordinate relationship

(b) That the superior knew or had reason to know that the criminal act was about to be or had been committed by the subordinate, and

(c) That the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.

The existence of a superior-subordinate relationship

159. Before finding criminal liability under Article 6(3), there must be a connection or relationship between the accused and the perpetrator of the crime. This connection or relationship is that of superior and subordinate.

160. It is now settled law of the ICTR and ICTY that imputed criminal liability for acts of others (subordinates) extends not only to military but also civilian superiors. It has been noted that the use of the generic term "superior" (other than "command") in Art. 6(3) and 7(3) of the ICTR and ICTY Statutes reflects the legislative intent to extend criminal culpability to civilian superiors.[87] Although the *Akayesu* and *Musema* Judgments expressed some reluctance towards the application of this doctrine to civilians, the two judgments accepted it's application to civilians, and underscored a vital underpinning for its application, namely, the extent to which the superior exercised power, whether *de jure* or *de facto*, over the actions of his *indirect* subordinates.[74]

161. Further, the status of superior applies not merely to those who have been given a formalized position of control over others (subordinates). To the contrary, it applies regardless of whether that person exercises the requisite control (deliberated below) by virtue of *de jure* or *de facto* power. Moreover, the origin or title is immaterial.[75]

162. In determining whether or not a person is a superior under Article 6(3), the decisive criterion is the question of "effective control."

163. It is submitted by the Prosecution that in determining whether a person possessed "effective control" over another, the question rests on whether he or she had the "material ability" to order the commission of crimes or to prevent and punish them.[76]

164. The case law of both the ICTR and ICTY on command/superior liability and the notion of "effective" control is quite extensive. Below, the Prosecutor addresses

[74] Kayishema & Ruzindana T.C Judgment para 213,Celebici T.C Judgment paras 56-7,Musema T.C Judgment para 148

[75] Baglishema T.C Judgment para 218,Celibici T.C Judgment paras 364-378

[76] Musema T.C Judgment para 137, Baglishema T.C Judgment para 43,Celebici T.C Judgment para 214.

aspects of the jurisprudence he considers more pertinent to the facts/issues of the case before the Trial Chamber.

165. The Prosecutor's case is that Simon BIKINDI possessed both *de jure* and *de facto* powers, and that pursuant to his orders, *interahamwe*, militias, and the Hutu population committed atrocities against Tutsis in different parts of Gisenyi and Kigali prefectures in Rwanda. As was stressed in the *Bagilishema* Judgment, in circumstances where it is shown that the accused was the *de jure* and *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to found command responsibility. [77]

166. The Prosecutor adopts and relies on the position expressed in the Bagilishema judgment as part of his submissions in this brief. Without prejudice to the foregoing, even if the Chamber fails to find *de jure* powers of the accused, the Prosecutor submits that Simon BIKINDI was *de facto* superior over a wide range of persons including among others the *interahamwe*, militias, local authorities and the broader Hutu population. Simon BIKINDI possessed the "material ability" to prevent or punish offences.

167. The Prosecutor submits that the following approaches to the construction of the notions of "effective control" and "material ability" are important in finding Simon BIKINDI guilty under Article 6(3).

168. First, the notion "material ability" to prevent or punish offences has been construed not restrictively, but purposively. Material ability is not limited to the more direct forms of punishing or preventing transgressions through issuing orders or taking disciplinary actions, but also encompasses indirect forms of preventing transgressions, such as submitting reports to the competent authorities in order for proper measures to be taken[78]. The Prosecution endorses this approach.

169. The Prosecutor submits that Simon BIKINDI as a leader, possessed "material ability" to control the actions of a wide segment of Rwanda's population in Gisenyi and Kigali Prefectures, including administrative personnel, political party officials and members, and armed civilian and militia groups. Simon BIKINDI possessed the material ability of preventing the commission of crimes, such as submitting reports to the competent authorities in order for proper measures to be taken. Simon BIKINDI failed in this regard, and must incur criminal liability.

170. Moreover, in construing the "sanctioning power" of a superior, a civilian superior's power must be construed more liberally/broadly than that of a military superior. Thus, in the *Aleksovski* Judgment, it was held as follows:

[77] Baglishema T.C Judgment para 223
[78] Blaskic T.C Judgment para 302

> [A] civilian's sanctioning power must....be interpreted broadly. It should be stated that the doctrine of superior responsibility was originally intended only for military authorities. Although power to sanction is the corollary of the power to issue orders within the military hierarchy, it does not apply to civilian authorities. It cannot be expected that a civilian will have disciplinary power over his subordinate equivalent to that of the military authorities in analogous command position. To require a civilian authority to have sanctioning power similar to those of a member of the military would limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities. The Trial Chamber therefore considers that the superior's ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to appropriate authorities suffices once the civilian authority through its position in hierarchy is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.[79]"

171. The Prosecutor supports the above approach and adds that in the face of massive and systematic killings in Rwanda in 1994 and bearing in mind the legal duties of persons in authority, which arise both from international law (such as the Genocide Convention) and under national laws (including Rwanda's Constitution of 1991) [80]to protect all persons without discrimination, and to prevent and punish genocide, all authorities regardless of their duties/mandates were expected to respond at least/at a minimum along the lines underlined in the above decision.

172. The Prosecutor further submits that in establishing the *de facto* power of Simon BIKINDI in this case, among other factors, serious consideration must be given to the manner in which authorities were perceived in the Rwandan society, and the power and influence he wielded. While some jurisprudence has found that the power and influence of a person over others alone may be insufficient to render one a superior,[81] the Prosecutor will go further to consider such power and influence at the trial of Simon BIKINDI.

173. The Prosecutor will lead evidence to demonstrate that under the extensive culture of respect for authority, Simon BIKINDI commanded or wielded extensive power of influence, authority and control over the perpetrators of atrocities, including *Interahamwe*, militias, local authorities and the broader Hutu population. On the basis of this extensive power and influence, he had the material ability to prevent and punish crimes. The Prosecutor urges the Trial Chamber to apply the approach

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[79] Aleksovski T.C Judgment para 78,Blaskic T.C Judgment para 302

[80] The Prosecutor respectfully refers to his submissions relating to finding responsibility under Article 6 (1) of the Statute through the Legal – duty omission conception

[81] Celebici T.C Judgment para 668.

taken in the *Musema* Judgment, where consideration was given to "psychological pressure"[82] as an important indicia of effective control.

174. Furthermore, the Prosecutor submits that the existence of superior authority, or effective control must not be construed mechanically to demand that the superior must always be present or "on-duty" when crimes are committed. What matters is that he knew or had reason to know, even if he or she was absent when the crimes were committed.

175. The concept of command does not strictly adhere to military ranking, but is based on analysis of the facts of a given situation; and thus the so-called direct military-command style is not mandatory.[83]

The Mental Element: Superior's Knowledge

176. To establish superior responsibility under Article 6(3), it must also be proved that the accused (superior) knew or had reason to know that the subordinate was about to commit the crimes or had done so and the accused failed to take the necessary and reasonable measures to prevent the crimes or punish the perpetrators thereof.

177. To establish knowledge, the jurisprudence of the Tribunal gives consideration to a broad range of factors. The Prosecution agrees with such approach. In the absence of direct evidence, the superior's knowledge may be established through direct or circumstantial evidence.

178. In determining whether a superior in fact possessed knowledge of the crimes despite his/her plea to the contrary, the *Celebici* Judgment considered, among others, the indicia listed by the Commission of Experts in its Final Report, including the number, type and scope of illegal acts; the time during which the illegal acts occurred and the geographical locations of the acts.[84]

179. The frequency and notoriety of the crimes and the proximity of the accused to the crimes, are also important considerations. Moreover, an accused's command position, though not decisive, is also a significant consideration.[85]

180. The Prosecutor submits that the widespread and systematic nature of killings and other acts of violence targeting Tutsis that were perpetrated by Simon BIKINDI's subordinates, including *interahamwe,* militias, local leaders, and the Hutu population throughout Rwanda, the presence of Simon BIKINDI and his proximity to various massacre sites, his regular travels to different parts of Gisenyi and Kigali-ville prefectures, among other indicia, do not allow him to deny knowledge of the perpetration of the crimes charged.

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[82] Musema T.C Judgment paras 140 and 144.
[83] Celebici A.C Judgment paras 243 and 251
[84] Celebici T.C Judgment para 386
[85] Celebici T.C Judgment para 770,Aleksovski T.C Judgment para 114,Baglishema T.C Judgment para 45

181. Alternatively, a superior may be found culpable if he or she had reason to know of the crimes "if some information was in fact available to him or her that would provide notice of offences committed by subordinates.[86] As to the form of information, "it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. The information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent to a mission, may be considered as having the required knowledge."[87]

182. The superior need not have acquainted himself with the information; what is required is proof that the relevant information was available to him.[88]

183. The issue as to whether or not a superior has a duty to know of the subordinates' crimes seems contentious. There is conflicting jurisprudence on the point. The Prosecutor submits that a finding that superiors have a duty to know is more reflective of customary international law, and should be adopted.

Necessary and reasonable measures to prevent or punish

184. The final requirement to establish superior responsibility is that the superior failed to take necessary and reasonable measures to prevent the commission of crimes or to punish the perpetrators.

185. It is submitted that what measures are "necessary and reasonable" cannot be determined *in abstracto*. They turn on the facts of each case.[89]

186. However, existing jurisprudence finds that a superior cannot be obliged to do the impossible. He may only be held criminally responsible for failing to take such measures that are within his powers. The Prosecutor submits that the lack of "formal legal competence" to take the necessary measures does not preclude a finding of criminal liability against a superior.[90]

187. The Prosecutor will lead evidence to prove that Simon BIKINDI in the instant case failed to take necessary and reasonable and measures to prevent the perpetration of the crimes or punish the perpetrators. The Prosecutor will demonstrate that his participation, *inter alia*, in committing, ordering, instigating, and/or aiding and abetting the perpetrators of the killings and violence, is

[86] Celebici T.C Judgment para 393
[87] Celebici A.C Judgment para 238
[88] Celebici A.C Judgment para 239
[89] Celebici T.C Judgment para 394
[90] Celebici T.C Judgment para 395

irreconcilable with any defence that he took any measures to prevent the crimes or to punish the perpetrators.

E: APPLICABLE SUBSTANTIVE LAW: ELEMENTS OF CRIMES

188. Simon BIKINDI in this case entered pleas of not guilty to all crimes with which he is charged, thereby placing every element of the crime in issue. Below, the Prosecutor makes submissions on the elements of the crimes of conspiracy to commit genocide, Genocide, or alternatively complicity in genocide, direct and public incitement to commit genocide, persecution and murder as crimes against humanity.

(i) Conspiracy to commit Genocide.

The Genocide convention prohibits the crime of conspiracy and is incorporated in Article 3 (b) of the ICTR Statute. The crime of conspiracy to commit genocide should require proof of four elements.

(a) An agreement.
(b) Membership in the agreement by the defendant.
(c) An overt act committed by a member of the agreement.
(d) That is in furtherance of the conspiracy

a. The Agreement

The central element of conspiracy to commit genocide is proof of an agreement, between two or more people, to achieve an unlawful purpose, namely the destruction in whole or part of a group protected under the Genocide Convention. It is not necessary to prove an express or formal agreement, but rather a mutual understanding, spoken or unspoken, to achieve the common unlawful purpose of the destruction in whole or in part of a protected group. As conspiracy is characterized by secrecy and is seldom amenable to proof by direct evidence, the agreement can be proven by circumstantial evidence including the course of conduct and actions of the parties

b. Membership by the Defendant

The second element is that the defendant knowingly, willfully and voluntarily became a member of the agreement. It is not necessary for the defendant to conspire with every other member of the agreement or to know the details of every member's actions. What is needed is an understanding of the basic aims and purposes of the agreement

c. The Overt Act.

The third element is proof of an act or failure to act committed by a co-conspirator. The act does not necessarily have to be committed by the defendant because an act of one co- conspirator is attributable to all members of the conspiracy. The act however should have occurred within the temporal jurisdiction of the ICTR.

d. Committed in furtherance of the Conspiracy

The overt act must be committed in furtherance of the conspiracy. The act may be minor or even not necessarily criminal in and of itself. Straightforward examples of overt acts may include acts of genocide (e.g, killing), incitement speeches made by members of the conspiracy, meetings related to the conspiracy, or any other act that advances the purposes of the agreement.

e. Mens rea

"With respect to the *mens rea* of the crime of conspiracy to commit genocide it rests on the concerted intent to commit genocide, that is to destroy, it in whole or part a national, ethnic, racial or religious group as such. Thus it is the view of the Chamber that the requisite intent for the crime of conspiracy to commit genocide is, ipso facto, the intent required for the crime of genocide that is the *dolus specialis* of genocide. It emerges from this definition that, as far as the crime of conspiracy to commit genocide is concerned, it is indeed, the act of conspiracy itself, in other words the process of conspiracy, which is punishable and not its result. The Chamber notes in this regard, that under both civil and common law systems, conspiracy is an inchoate offence which is punishable by virtue of the criminal act as such and not as a consequence of the result of that act. The Chamber is of the view that the crime of genocide is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide has not actually been perpetrated [91]

(ii)Genocide

189. Simon BIKINDI is charged in Count II with Genocide, a crime stipulated in Article 2(3)(a) of the Statute. Specifically, he is charged with the enumerated crimes of killing or causing serious bodily or mental harm to members of the Tutsi population with the intent to destroy in whole or in part a racial or ethnical group.

By way of background, the crime of genocide was punishable in Rwanda in 1994 as Rwanda acceded by legislative decree to the Convention of Genocide on 12 February 1975.[92] The 1948 Convention on the Prevention and Punishment of the Crime of Genocide is undeniably considered part of customary international law. Authority for this proposition can be found in the Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[93], and as was recalled by the United Nations Secretary-General in his report on the establishment of the

[91] Musema T.C Judgment paras 192-194

[92] Legislative Decree of 12 February 1975, Official Gazette of the Republic of Rwanda, 1975, p. 1975: Musema Trial Chamber Judgment, para. 152

[93] I.C.J. Reports (1951), page 15 at 23

ICTY.[94] There is evidence to suggest that the Genocide Convention itself was considered to be a codification of custom at the time of its drafting.[95]

Actus reus

190. With regard to *actus reus*, Genocide may be committed by any of the criminal acts enumerated in Article 2(2) of the Statute, namely: (a) killing members of the group; (b) causing serious bodily or mental harm to the 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 a group; and (e) forcibly transferring children of the group to another group.

191. The above definition of genocide in the Statute of the Tribunal is taken verbatim from Articles 2 and 3 of the Convention on Prevention and Punishment of the Crime of Genocide (1948). As noted above, the purpose and objectives underlying this Convention should enrich the construction given to Article 2 of the Statute of the Tribunal.

192. Rwanda acceded by legislative decree to the Convention on Genocide on 12 February 1975. Thus, the crime of genocide was punishable in Rwanda in 1994[96]. In any event, as was held in *Akeyesu* Judgment, the Genocide Convention is undeniably considered part of customary international law, as can be seen from the Advisory opinion of the International Court of Justice on the provisions of the Convention, and as was recalled by the United Nations Secretary-General in his report on the establishment of the ICTY.[97]

"Killing" members of the group

193. Regarding the content of the genocidal crime of killing members of the group, the jurisprudence of the Tribunal reflects some contention, especially regarding whether premeditation is required in all cases. In the *Akeyesu* Judgment, it was held that the crime connotes a homicide committed with intent to cause death[98]. The *Kayishema & Ruzindana* Judgment expounded the definition of "killing members of the group" to refer to an unlawful and intentional killing which is committed with intent to destroy a group in whole or in part[99].

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[94] Akayesu Trial Chamber Judgment, para. 495

[95] *In drafting instructions to the Economic and Social Council's ad hoc Committee on Genocide the* United Nations Secretariat commented that "It will not be the first time that the convention has been concluded on a matter on which rules of customary law already exist." United Nations Economic and Social Council "Ad Hoc Committee on Genocide" E/AC.25/3/Rev.1 pages 6 and 7

[96] Legislative Decree of 12 February 1975Official Gazette of the Republic of Rwanda, 1975,Musema T.C Judgment para 152

[97] Akayesu T.C Judgment para 495

[98] Akayesu T.C Judgment para 500

[99] Kayishema & Ruzindana T.C Judgment para 103, Baglishema T.C Judgment para 58

194. The Prosecutor submits that the Trial Chamber should take into account the fact that there are situations where premeditation may not be required. For instance, where a person engages in unlawful killings of human beings as a result of engaging in conduct that is in reckless disregard for human life, the Trial Chamber should find criminal culpability.

195. Furthermore, the Prosecutor submits that in establishing responsibility for the crime under consideration, like for the other crimes with which the accused is charged, the Trial Chamber should consider the purposive approaches to the definition of participation both under Article 6(1) and 6(3) provided by the Prosecutor above and their application to the facts of this case. For instance, it is vital to consider that the crime may be committed through both acts and omissions. Where an accused has a duty to act, as is the case with Simon BIKINDI in the instant case, his failure to take action when innocent civilians are massively massacred throughout the country, should be construed to ground criminal culpability. The definitions of planning, aiding and abetting, commission, instigation and ordering in Article 6(1), and the elements of Article 6(3) presented above are important. Concerning an accused person's participation in a joint criminal enterprise to "kill members of a group," (as the Prosecutor pleads, among other forms of participation), it is vital to consider that the crime of killing or murder may be attributed to each individual participant in the joint criminal enterprise, including those not physically carrying out the killing[100]. The indicia applied to establish *dolus specialis* described below in cases where there is no evidence of direct or explicit acts or omissions, are also important.

Causing serious bodily or mental harm to members of the group

196. The Prosecutor submits that "causing serious bodily or mental harm to members of the group" in Article 2(2)(b) should not be construed restrictively. The jurisprudence of the Tribunal has pursued a purposive approach. In the *Akeyesu* Judgment, the Trial Chamber defined the crime to include and not to be limited to acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.[101] In the *Musema* Judgment, the Trial Chamber expounded on the definition adopted in *Akayesu*, holding that the crime includes, but is not limited to acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence and persecution.[102]

197. As has been emphasized by the jurisprudence of the Tribunal, "serious harm" does not necessarily mean that the harm is permanent or irremediable.[103]

Mens rea

[100] Tadic A.C Judgment paras 190-229 and the Prosecutor's submissions regarding joint criminal enterprise as a form of participation under Article 6 (1) above
[101] Akayesu T.C Judgment para 504
[102] Musema T.C Judgment para 156
[103] Akayesu T.C Judgment para 502

198. As distinguished from other crimes, to prove culpability for the crime of genocide, the Prosecutor must establish that the relevant *actus reus* was committed with the special intent (*dolus specialis*) to destroy a national, ethnic, racial or religious group as such. For the crime of genocide to be committed, this special intent must have been formed prior to the commission of the genocidal acts.[104] It should be noted, however, that the individual acts themselves do not require premeditation; "the only consideration is that the act should be done in furtherance of the genocidal intent.[105] There is an exception in the case of proving genocidal acts by aiding and abetting pursuant to Art. 6(1) where the Prosecutor need only prove that the accused had knowledge of the principal perpetrator's specific intent to commit genocide, and need not share that intent.[106]

199. It is the established jurisprudence of the Tribunal that special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus the special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such.[107] The term has been construed broadly to encompass acts that are committed not only with intent to cause death, but also to include acts that may fall short of causing death including rape and sexual violence.[108]

200. The requirement that the accused must commit the *actus reus* with intent to destroy a group "as such" means that the acts must be committed against a specifically targeted group.[109] As the Trial Chamber has emphasized,

> [...] in concrete terms, for any of the acts charged under Article 2(2) of the Statute to be a constitutive element of genocide, the act must be committed against one or several individuals because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of the group chosen as such, which means that the victim of the crime of genocide is the group itself and not only the individual[110].

201. Where there is no evidence or direct and explicit proof of *dolus specialis*, such as a confession by the accused, intent may be inferred from a number of

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[104] Jelesic A.C Judgment para 45, Akayesu T.C Judgment para 498, Baglishema T.C para 55, Kayishema & Ruzindana T.C Judgment para 91

[105] Kayishema &Ruzindana T.C Judgment para 91

[106] Krystic AC para 134-140; Ntakirutimana AC para 500-50; Krnojelac AC para. 52

[107] Akayesu T.C Judgment para 498,Rutaganda T.C Judgment para 59

[108] Jelesic Appeals Chamber Judgment, para. 45; Akayesu Trail Chamber Judgment, para. 498; Bagilishema Trial Chamber Judgment, para. 55

[109] Akayesu T.C Judgment para 499

[110] Akayesu T.C Judgment para 521

presumptions of facts or circumstantial evidence[111]. Such presumptions or circumstances include, the material element or the *actus reus* committed by the perpetrator; or it may be inferred from the general context of the perpetration of the other culpable acts systematically directed against the same group, regardless of whether the acts were committed by the same perpetrators.[112]

202. Furthermore, the genocidal intent may be inferred from the scale of the atrocities committed, their general nature, in a region or a country, or the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups[113]. Citing with approval the cases of *Karadzic and Mladic*,[114] the Trial Chamber in *Akayesu* also noted that genocidal intent may be inferred from the general political doctrine which gave rise to the acts or the repetition of destructive and discriminatory acts; it may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group. With respect to the evidence adduced in the *Karadzic and Mladic Case*, the Trial Chamber found the special intent/*dolus specialis* for genocide from the combined effect of speeches or projects laying the ground work for and justifying the acts; from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group.[115]

Other requirements

203. Regarding the requirement that the perpetrator must intend to "destroy a group in whole or in part," the term "destruction of a group" does not require proof that the perpetrator intended to achieve the complete annihilation of the group from every corner of the globe.[116] What is required is the intent to destroy a group or a substantial part of the group. Consequently, the requirement is fulfilled if it is proved that the perpetrator intended to destroy a multitude of individuals because of their membership in a particular group even if these persons constitute only part of a group either within a country or within a region or within a single community. On this issue, the Trial Chamber in the *Krstic* case has explained thus,

> The killing of all members of the part of the group located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area.[117]

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[111] Akayesu T.C Judgment para 523
[112] Akayesu T.C Judgment para 523
[113] Akayesu T.C Judgment para 523
[114] See ICTY Decision of T.C I RodovanKaradzi,Ratko Mladic (Cases Nos IT-95-5-R61 and I95-18-R61) Consideration of the indictment within the framework of Rule 61 of the RPE.
[115] Karadzic & Mladic Case para 94 Akayesu T.C para 524
[116] Kayishema & Ruzindana T.C Judgment para 95
[117] Krstic T.C Judgment para 590

204. Furthermore, the requirement "destruction of a group or part" does not imply the actual extermination of the group. The term has been construed broadly to encompass acts that are committed not only with intent to cause death, but also includes acts which may fall short of causing death. In the *Akayesu* Judgment, the Trial Chamber held that rape and other acts of sexual violence constituted serious bodily and mental harm sufficient to amount to *actus reus* of genocide.[118] In the *Musema* Judgment, based on the evidence before it, the Trial Chamber found that rape and acts of sexual violence were often accompanied with humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group. The Trial Chamber concluded that acts of rape and sexual violence were an integral part of the process of destruction specifically targeting Tutsis women and contributing to their destruction and the destruction of the Tutsi group as such.[119]

(iii) Complicity in genocide

205. In the alternative to genocide, Simon BIKINDI is charged with complicity in genocide, a crime stipulated in Article 2(3)(e) of the Statute of the Tribunal. It is alleged by the Prosecutor that Simon BIKINDI instigated, procured the means, aided and abetted, or otherwise facilitated the killing or the causing of bodily or mental harm to members of the Tutsi population.

206. Complicity in genocide involves proof by the Prosecution that the accused associated himself in the commission of genocide, by participating in any of the following: *instigating*, *aiding* or *abetting*, or *procuring* (the means to execute) the genocide[120].

207. It must be proved that the crime of genocide has actually been committed (by the perpetrator whom the accused assisted), although it is unnecessary to prove that the perpetrator has himself/herself been tried or convicted.[121]

208. It must also be proved that the accused committed any of the acts of complicity knowing that he/she was assisting the commission of the crime of genocide and that the perpetrator of the genocide possessed the *dolus specialis*, but the accused need not possess the same *dolus specialis* for genocide.[122]

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[118] Akayesu T.C Judgment paras 731-734

[119] Musema T.C Judgment paras 933-934,Kayishema & Ruzindana Judgment para 95

[120] Musema T.C Judgment paras 170,176,177,Baglishema T.C Judgment para 70 Akayesu T.C Judgment paras 533-535

[121] Musema T.C Judgment paras 173-4.In para 174 of the Musema Judgment the Trial Chamber emphasized that the accused may be found guilty of complicity even where the principal perpetrator of the crime has not been identified, or where for any other reason the principal perpetrator's guilt cannot be proved.

[122] Musema T.C Judgment paras 180-183,Baglishema T.C Judgment paras paras 70-71, Furundziga T.C Judgment paras 236-249.

209. *Complicity by instigation* involves proof that the accused, though not directly participating in genocide, "gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or directly incited the commission of genocide."[123] In general, under the jurisprudence engendered both by the ICTR and ICTY, "instigating" has been defined as "prompting another to commit an offence.[124]

210. *Complicity by aiding and abetting* implies a positive action, which, according to the *Musema* Trial Chamber Judgment, in principle excludes complicity by failure to act (or omission).[125] The *Musema* Judgment on this point appears to set a general rule, [hence the notion, "in principle"]. The Trial Chambers in Akayesu and Musema advanced the proposition that an accused would be liable for Complicity in Genocide if he "knowingly" aided or abetted or instigated one or more persons in the commission of genocide while knowing the specific intent of such perpetrator to commit genocide, even though the accused himself did not share the intent.[126] Given the divergent views on the distinction between Complicity under Art 2(3)(e) and aiding and abetting Genocide under Art 6(1) the Prosecutor subscribes to the Kristic approach and submits that where "knowledge" is proved the accused should be convicted of aiding and abetting Genocide on the basis that it is a better characterization of the culpability of the accused.[127]

Indeed, other decisions of the Tribunal have extended aiding and abetting to *omissions*.[128] The Prosecutor submits that the approach of construing aiding and abetting as encompassing "omissions" is more appropriate. In the instant case, the Prosecutor will lead evidence to demonstrate that Simon BIKINDI aided and abetted the crimes with which he is charged through both positive acts and omissions. Evidence of omission will include his silence in the face of massive and systematic killings and other acts of violence targeting Tutsis and his failure

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[123] Musema T.C Judgment para 179 citing Article 9-c of the Rwandan Penal Code

[124] Akayesu T.C Judgment para 482,Krstic T.C Judgment para 601,Blaskic T.C Judgment para 280,Kvocka T.C Judgment para 243,Kordic T.C Judgment para 387

[125] Musema T.C Judgment para 178

[126] See Akayesu T.C. Judgment para 545 and Musema T.C. Judgment at 183. It's submitted that para 540 Akayesu was referring to accomplice liability in the context of Complicity.

[127] The Prosecutor submits the proof of "knowledge" as the mens rea for aiding and abetting is only a minimum threshold for establishing accomplice liability. Where however the Prosecutor alleges and is to prove "shared intent" between the aider/abetter and the principal perpetrator, an accused may be held liable as a principal perpetrator. For this proposition see the reasoning in Krstic Appeal Judgment, para. 134 "As has been demonstrated, all that the evidence can establish is that Krstic was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge , he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trail Chamber to supply adequate proof that Radislav Krstic possessed the genocidal intent. Krstis, therefore, is not guilty of genocide as principal perpetrator."

[128] Akayesu T.C Judgment para 548,705, Kayishema & Ruzindana Judgment para 202,Blaskic case para para 284.

to take necessary action to prevent or punish the crimes in breach of a legal duty incumbent on him.

211. Moreover, the assistance by the aider and abettor need not necessarily be practical. Indeed, in certain circumstances, the assistance may consist of moral support or encouragement.[129] The Prosecutor agrees with these approaches. The Prosecutor submits that Simon BIKINDI is criminally culpable not only through "positive" acts, but also through omissions, taking into account that he held a high position of authority in Rwanda. His silence, for instance, in the face of massive and systematic killings and other acts of violence targeting Tutsis sent a clear signal of tolerance and/or moral support and encouragement of the crimes.

212. Moreover, in the *Frundzija* Judgment, the Trial Chamber rejected the ILC Draft Code's proposal that the assistance must be given directly, noting first that the requirement is more restrictive and misleading, and second that the requirement has not been adopted in the Statute of International Criminal Court.[130] The Prosecutor supports the *Frundzija* approach.

213. In complicity by aiding and abetting, it is not necessary to prove the accused person's presence at the scene(s) of the crime. In the *Musema* Judgment, it was held that "the relevant act of assistance may be geographically and temporally unconnected to the actual commission of the crime."[131] The Prosecutor supports this approach, and among other strategies, will invoke it against Simon BIKINDI.

214. It has been held that in accomplice culpability, the accomplice's assistance must have *a substantial effect* on the commission of the crime.[132] In the *Tadic* Trial Chamber Judgment, it was held that the contribution is "substantial" if the act [crime] most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.[133]

215. It should be noted, however, that while requiring that the accomplice's assistance must have *a substantial effect* on the commission of the crime, the assistance need not constitute an *indispensable element* or *conditio sine qua non* of the acts of the principle perpetrator.[134] After reviewing the post-World War II case law in occupied Germany and the *Tadic* Judgment, the *Frundzija* Judgment found that while the accomplice's act must have a substantial effect on the principal's, *causation* is not a requirement for criminal responsibility for aiding and abetting.

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[129] See generally Akayesu T.C Judgment ,Frundziga T.C Judgment paras 199-235

[130] Frundziga T.C Judgment para 232

[131] Musema T.C Judgment para 125,Kayishema & Ruzindana T.C para 201Baglishema T.C Judgment para 33.

[132] Baglishema T.C Judgment para 33,Kvocka T.C Judgment para 243,Krstic T.C Judgment para 601,Aleksocski A.C Judgment paras 162-4

[133] Tadic T.C Judgment para 688

[134] Baglishema T.C Judgment para 33

Thus, the Trial Chamber concluded, the acts of the accomplice need not bear a causal relationship to, or be a *conditio sine qua non* for those of the principal.[135]

216. The requirement that the accomplice's assistance must have *a substantial effect* on the commission of the crime seems to establish a high threshold. The Prosecutor submits that a lower threshold should be preferred.

217. Indeed, a number of cases have rejected or relaxed the threshold. In the *Blaskic* Judgment,[136] for instance, it was held that the accomplice's act need not have a causal effect on the principal offender. It seems to be more plausible or a better approach to focus more on the accomplice's conduct as a manifestation of a willingness to be associated with the crime and support the principle. Furthermore, as was held in the *Bagilishema* case, "[M]ere encouragement or moral support by an aider and abettor may amount to assistance. The *accomplice need only be concerned with the killing.*[137] The latter approach was also adopted in the *Tadic* Judgment.[138]

218. The *Rome Statute* for the Permanent International Criminal Court omits the use of the term "substantial" in dealing with the issue. Indeed, as one analyst has argued, "[t]he [Rome Statute's] failure to follow the International Commission draft may suggest that the Diplomatic Conference meant to reject the higher threshold of the recent case law of the Hague[139]."

219. Moreover, the further elaboration of the "contribution" requirement by the jurisprudence of ICTR and ICTY, including that it need not be an *indispensable element* or the *condition sine qua non* of the acts of the perpetrator, demonstrates a trend toward a broader approach.

220. In complicity by aiding and abetting, it should be noted that the prosecution need not prove both aiding and abetting; either of the two suffices.[140]

221. *Complicity by procuring* covers persons "who procure weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.[141]

(iv) Direct and Public Incitement to Commit Genocide

222. Incitement to commit genocide requires proof of two elements.

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[135] Farundziga T.C Judgment para 233
[136] Blaskic T.C Judgment para 285
[137] Baglishema T.C Judgment para 33
[138] Tadic T.C Judgment para para 691
[139] William A Schabas, General Principles of Criminal Law in the International Criminal Court Statute (Part 111) in Vol 6 European Journal of Crime, Criminal law and Criminal Justice (1998) at 412
[140] Kayishema &Ruzindana T.C Judgment para 196,Akayesu T.C Judgment para 484.
[141] Musema T.C Judgment para 178.

a. That defendant committed an act, such as a public speech or published newspaper / journal article.

b. With the intent to encourage others to commit genocide.

Both of these elements may be proven by the speech given or article written by the defendant. The words in the speech/article constitute the act and their meaning may be sufficient to infer the required intent. Moreover the speech/ article may also provide evidence related to a conspiracy charge

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"The public element of incitement to commit genocide may be better appreciated In light of two factors the place where the incitement occurred and whether or not assistance was selective or limited. A line of authority commonly followed in civil law systems would regard words as being public where they were spoken aloud in a place that were public in definition. According to the International law commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example radio or television. It should be noted in this respect that at the time convention was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement"[142].

"The direct element of incitement implies that the incitement assume a direct form And specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement. Under civil law systems, provocation, the equivalent of incitement, is regarded as being direct where it is aimed at causing a specific offence to be committed. The prosecution must prove a direct causation between the act characterized as incitement, or provocation in this case, and a specific offence however the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct and nonetheless implicit. Thus at the time the convention on genocide was being drafted, the Polish delegate observed that it was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible economic or other difficulties in order to create an atmosphere favorable to the perpetration of the crime"[143]

"It may be defined as directly provoking the perpetrators 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

[142] Akayesu T.C Judgment para 556
[143] Akayesu T.C Judgment para 557

Through the public display of placards or posters, or through any other means of audio visual communication"[144].

"**Mens Rea** required for the crime of direct and public incitement to commit Genocide lies in the intent to directly prompt or provoke another to commit Genocide .It implies a desire on the part of the perpetrator to create by his actions A particular state of mind necessary to commit such a crime in the minds of the Persons he is so engaging. That is to say the person who is inciting to commit Genocide must have himself the specific intent to commit genocide, namely to Destroy, in whole or in part, a national, ethnical, racial, or religious group, as such"[145]

Therefore the issue before the Chamber is whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful. It appears from *the travaux preparatoires* of the convention on genocide that the drafters of the Convention considered stating explicitly that incitement to commit genocide should be punished.[146]

In the opinion of the Chamber the fact that such acts are in themselves particularly dangerous of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator[147].

(v) Crimes Against Humanity

223. The Prosecutor charges Simon BIKINDI with Persecution and Murder as Crimes against Humanity, crimes stipulated in Article 3 of the Statute.

224. Under article 3 of the Statute, an offence[148] constitutes a crime against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

225. There is no need to establish a *war nexus*, i.e. these crimes are committed regardless of whether there was an armed conflict, internal or international.[149]

226. Three essential elements must be proved to establish crime against humanity,[150]as discussed below:

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[144] Akayesu T.C Judgment para 559
[145] Akayesu T.C Judgment para 560
[146] Akayesu T.C Judgment para 561
[147] Akayesu T.C Judgment para 562
[148] The prescribed offences are murder,, extermination, enslavement,deportation,imprisonment,torture, rape, persecution on political,racial and religious grounds, and other inhumane acts Article 3 a (i) of the ICTR Statute.
[149] Akayesu T.C Judgment para 565

227. First, the crime must be committed as part of either a *widespread* or *systematic* attack, not just a random act of violence.[151] An attack is "widespread" if it is massive, frequent, large scale, or carried out collectively with considerable seriousness and directed against a multiplicity of victims. The Prosecution submits that although the scale, number of victims, and multiplicity of acts could occur throughout a territory or region, the element of "widespread" does not depend on establishing any requisite geographic range. An attack is "systematic" if it is thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.[152] There is no requirement that the crime itself be widespread or systematic; a single act could constitute a crime against humanity if it occurred within the context of a widespread or systematic attack.[153] However, the crimes committed must be related to the attack[154] and the accused must have actual or constructive knowledge that the offence(s) were so related.[155]

228. While existing jurisprudence generally holds that there should be some kind of pre-conceived plan or policy, there is no requirement that the policy must be adopted formally as a policy of a state, and such policy may be instigated or directed by any organization whether or not representing the government of a state.[156]

229. Second, the attack must be directed against members of a civilian population, meaning "people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed "hors de combat" by sickness, wounds, detention or any other cause.[157] The targeted population only needs to be predominantly civilian; the presence of certain non- civilians in it is immaterial[158] The term "population" does not mean that the entire population of a given state or territory must be victimized by the

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[150] Akayesu T.C Judgment para 578,Baglishema T.C Judgment para 91

[151] Akayesu T.C Judgment para 579,Baglishema T.C Judgment para 77-8,Blaskic T.C Judgment para para 207,Baglishema T.C Judgment para 77.

[152] Akayesu T.C Judgment para 580

[153] See Akayesu Trial Chamber Judgment, para. 580; Tadic Judgment, para. 649; Prosecutor v. Kupreskic, Case No. IT-95-16, Judgment (hereinafter Kupreskic Judgment) para. 550

[154] "The Trial Chamber correctly recognized that crimes which are unrelated to wideapread or systematic attacks on civilian population shuld not be prosecuted as crimes against humanity." Tadic Appeals Judgment, para. 271

[155] Kayishema and Ruzindana Judgment, para. 134, 135; Musema Judgment, para. 206; Bagilishema Judgment, paras. 82, 94; Tadic Appeals Judgment, para. 271; see also Tadic Appeals Judgment, para. 248, which ruled that in order to convict, "the acts of the accused must compromise part of a pattern of widespread and systematic crimes" and that the "accused must have known that his acts fit into such a pattern."

[156] Baglishema T.C Judgment para 78

[157] Akayesu T.C Judgment para 582

[158] Tadic T.C Judgment para 638 Baglishema T.C Judgment para 79

acts, but only relates to the collective nature of the crimes, excluding isolated acts not rising to the level of crimes against humanity.[159]

230. Finally, the broader attack must be committed on discriminatory grounds. This qualifier, which is peculiar only to the ICTR, and is absent in the ICTY Statute,[160]only relates to the nature of the broader attack, and not to the *mens rea* of the perpetrator[161]. Similarly, the underlying act/crime need not be widespread or systematic [one act by a perpetrator may constitute a crime against humanity] as long as it is part of the broader attack.[162]

231. The term "attack" has been defined as an unlawful act of the kind enumerated in Article 3 of the Statute, but the attack may also be non-violent in nature, such as apartheid, "or exerting pressure on the population to act in a particular manner, which may come under the purview of an attack, of orchestrated on a massive scale or in a systematic manner.[163]

Persecution

232. Simon BIKINDI is charged with Persecution in Count 6 as a crime against humanity under Article 3(h) of the Statute.

233. The material element of Persecution is the severe deprivation of fundamental rights on discriminatory grounds. The underlying offence of persecution requires the assistance of a *mens rea* from which it obtains its specificity. It must be committed for specific reasons whether these be linked to political views, racial background or religious convictions .It is the specific intent to cause injury to human being because he belongs to a particular community or group, rather than the means employed to achieve it, that bestows on its individual nature and gravity and which justifies its being able to constitute criminal acts which might appear in themselves not to infringe directly upon the most elementary rights of a human being, for example attacks on property .In other words, the perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific racial religious or political group "The concept of attack may be defined as an unlawful act of the kind enumerated in Article 3 (a) to (1) of the Statute, an attack may also be non violent in nature like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview or an attack if orchestrated on a massive scale or in a systematic manner"[164].On the issue of the discriminatory grounds required for a conviction for crimes against humanity Persecution the

[159] Tadic T.C Judgment para 644,Baglishema T.C Judgment para 80
[160] See ICTY Statute Art 5Tadic A.C Judgment paras 283-285
[161] Baglishema T.C Judgment para 81, Akayesu A.C Judgment para 469,Kayishema & Ruzindana T.C Judgment paras 133-134
[162] Baglishema T.C Judgment para para 82, Akayesu A.C Judgment para 469
[163] Musema T.C Judgment para 205, Akayesu T.C Judgment para 581 Rutaganda T.C Judgment para 70
[164] Akayesu T.C Judgment para 581

prosecution wishes to draw attention to the difference between the statute of the ICTR and the statute of the ICTY. The statute of the ICTR contains within the chapeau of Article 3 the words "Against any civilian population on national, political, ethnic racial, or religious grounds. This is in contrast to the statute of the ICTY, which in the relevant part of its analogous Article 5 contains only the words, "Against any civilian population." The statute of the ICTR was adopted after the UN Security Council enacted Resolution 955.This resolution said that the council had "Taken note" of the reports of the Special Rapporteur of the United Nations Commission of Experts. All of these reports emphasized the fact that persons have been targeted for attack on an "ethnic basis'. For instance, in the section of the report of the Special Rapporteur of 28 June 1994 describing the nature of the massacres in Rwanda, as well as their causes and their planning the following sentence appeared.

"The first is the campaign of ethnic hatred and violence orchestrated by the media belonging to the government, or close to it, such as Radio Rwanda, and above all *Radio Télévision Libre Collines* (RTLM)"

Later in the same report, the Special Rapporteur called this incitement to ethnic hatred and violence had been a long standing campaign that had been revealed previously in the report of the International Committee of Inquiry in January 1993 and by the previous UN Special Rapporteur, Bacre Waly Ndiaye, after his mission in April 1993.

Given that the reports described a campaign of "incitement to ethnic hatred and violence" and not necessarily a campaign of "incitement to commit genocide" this kind of conduct might not have been prosecutable unless it had been found to fall within the area of crimes against humanity Persecution. Under these circumstances it made sense for the Security Council to add "ethnic" and national" to the chapeau of Article 3 to make sure that it did not exclude any of the groups included in Article 2 regarding genocide. While it would have been preferable for the Security Council to have inserted these words in section 3(h), their placement in the chapeau showed an intent to apply these grounds to the entire circle, in order to deal with what it found had occurred in Rwanda. It is the position of the prosecution that the communications of RTLM can be prosecuted because it constituted persecution on racial or political grounds.

234. "Unlike the other acts of crimes against humanity enumerated in the Statute of the Tribunal, the crime of persecution specifically requires a finding of discriminatory intent on racial, religious or political grounds. This requirement has been broadly interpreted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) to include discriminatory acts against all those who do not belong to a particular group, i.e. non-Serbs.[165].In Rwanda the targets of attack were the Tutsi ethnic group and the so-called "moderate" Hutu political opponents who

[165] *Tadic* (TC) para. 652. *Tadic* (AC) para. 249. *Prosecutor v. Stevan Todorovic*, IT-95-9/1, Sentencing Judgment, para. 12 (Trial Chamber I, 31 July 2001), para. 236. In *Krnojelac* (AC) para. 187, the ICTY Appeals Chamber stated that the accused "had sufficient information to alert him to the risk that inhumane acts and cruel treatment were being committed agains the non-Serb detainees because of their political or religious affiliation". Nahimana T.C Judgment para 1071

supported the Tutsi ethnic group. The group against which discriminatory attacks were perpetrated can be defined by its political component as well as its ethnic component.[166] RTLM, *Kangura* and CDR, as has been shown, essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity. In these circumstances, discriminatory intent of the accused falls within the scope of the crime against humanity of persecution on political grounds of an ethnic character.

235. In *Ruggiu*, its first decision regarding persecution as a crime against humanity, the ICTR applied the elements of persecution outlined by the ICTY Trial Chamber in the *Kupreskic* case.[167] In these cases the crime of persecution was held to require "a gross or blatant denial of a fundamental right reaching the same level of gravity" as the other acts enumerated as crimes against humanity under the Statute."[168] It is evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. In *Ruggiu,* the Tribunal so held, finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of "the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society."[169] Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.

236. "Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people. In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed. Similarly, the

[166] Nahimana T.C Judgment para 1071.
[167] *Ruggiu* (TC) para. 21.Nahimana T.C Judgment para 1072
[168] Nahimana T.C Judgment para 1072
[169] *Ruggiu* (TC) para. 22. Nahimana T.C Judgment para 1072

activities of the CDR generated fear and hatred that created the conditions for extermination and genocide in Rwanda.

237. Freedom of expression and freedom from discrimination are not incompatible principles of law. Hate speech is not protected speech under international law. In fact, governments have an obligation under the International Covenant on Civil and Political Rights to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[170] Similarly, the Convention on the Elimination of all Forms of Racial Discrimination requires the prohibition of propaganda activities that promote and incite racial discrimination.[171]

238. A great number of countries around the world, including Rwanda, have domestic laws that ban advocacy of discriminatory hate, in recognition of the danger it represents and the harm it causes. These countries include the following: The Criminal Code of Germany prohibits incitement to hatred and violence against segments of the population, including the dissemination of publications or broadcasts that attack human dignity.[172] A press law in Vietnam prohibits the sowing of enmity among nations and people.[173] The Russian Criminal Code prohibits incitement of hatred by attacking human dignity, insulting, or maliciously degrading segments of the population.[174] The Criminal Code of Finland prohibits racist propaganda that threatens, denigrates or humiliates a group of persons.[175] In Ireland it is an offence to publish threatening, abusive or insulting material likely to stir up hatred.[176] A law in Ukraine prohibits propaganda for cruelty and the broadcast of pornography and other material that causes the demeaning of human honour and dignity.[177] The Criminal Code of Iceland prohibits racial hatred, including mockery, insults, threats and defamation.[178] Press that arouses scorn or hatred of some inhabitants for others is prohibited in Monaco.[179] The Criminal Code of Slovenia prohibits incitement of

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[170] ICCPR, Art. 20.Nahimana T.C Judgment para 1074

[171] CERD, Art. 4(a)Nahimana T.C Judgment para 1074

[172] Article 130, Criminal Code, European Commission Against Racism and Intolerance (website).Nahimana T.C Judgment para 1075

[173] Second periodic report of Vietnam to the Human Rights Committee, 05/14/2001.Nahimana T.C Judgment para 1075

[174] Article 282, Russian Criminal Code, European Commission Against Racism and Intolerance (website).Nahimana T.C Judgment para 1075

[175] Article 8, Chapter 11, Finnish Criminal Code European Commission Against Racism and Intolerance (website). Nahimana T.C Judgment para 1075

[176] Prohibition of Incitment to Hatred Act of 1989, Subpara. 2(1)(a) European Commission Against Racism and Intolerance (website). Nahimana T.C Judgment para 1075

[177] Fifth periodic report of Ukraine to the Human Rights Committee, 11/16/2000; web-site of the European Commission Against Racism and Intolerance. Nahimana T.C Judgment para 1075

[178] National Criminal Code, European Commission Against Racism and Intolerance (website). Nahimana T.C Judgment para 1075

[179] Initial report of Monaco to the Human Rights Committee, 8/28/2001. Nahimana T.C Judgment para 1075

inequality and intolerance.[180] China prohibits broadcasts that incite hatred on account of color, race, sex, religion, nationality or ethnic or national origin.[181]

239. In the light of well-established principles of international and domestic law, and the jurisprudence of the *Streicher* case in 1946 and the many European Court and domestic cases since then, that hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination. Within this norm of customary law, the prohibition of advocacy of discrimination and incitement to violence is increasingly important as the power of the media to harm is increasingly acknowledged.

240. In the case of *Nahimana,* the Chamber reviewed the broadcasts of RTLM, the writings in *Kangura*, and the activities of CDR in its legal findings on Direct and Public Incitement to Genocide (see paragraphs 1019-1037 of the *Nahimana* Judgment). Having established that all communications constituting direct and public incitement to genocide were made with genocidal intent, the lesser intent requirement of persecution, the intent to discriminate, has been met with regard to these communications. Having also found that these communications were part of a widespread or systematic attack, the Chamber found that these expressions of ethnic hatred constitute the crime against humanity of persecution, as well as the crime of direct and public incitement to genocide.

241. Persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms. For example, the *Kangura* article, *A Cockroach Cannot Give Birth to a Butterfly*, and *The Ten Commandments*, independently of its placement within the *Appeal to the Conscience of the Hutu*, constitute persecution. The RTLM interview broadcast on June 1994, in which Simbona, interviewed by Gaspard Gahigi, talked of the cunning and trickery of the Tutsi, also constitutes persecution, the propaganda of *Kangura* contaminated the minds of people. RTLM "spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country". This is the poison described in the *Streicher* judgement.

242. Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and *Kangura. The Ten Commandments*, broadcast on RTLM and published in *Kangura*, vilified and endangered Tutsi women.[182] By defining the Tutsi woman as an enemy in this way, RTLM and *Kangura* articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.

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[180] Criminal Code, Article 63. European Commission Against Racism and Intolerance (website). Nahimana T.C Judgment para 1075

[181] Initial report of China-Hong Kong to the Human Rights Committee, 6/1/6/99. Nahimana T.C Judgment para 1075

[182] Nahimana T.C Judgment para 1079

243. Persecution when it takes the form of killings is a lesser included offence of extermination. The nature of broadcasts, writings, and the activities of CDR is such, however, that the same communication would have caused harm of varying degrees to different individuals. An RTLM broadcast, *Kangura* article, or CDR demonstration that led to the extermination of certain Tutsi civilians inflicted lesser forms of harm on others, constituting persecution. These actions by the Accused therefore constitute multiple and different crimes, for which they can be held separately accountable.[183]

244. In addition to relying on Simon BIKINDI's participation in a joint criminal enterprise to kill Tutsis, as well as on his participation in physically carrying out killings as part of widespread or systematic attacks against civilians, the Prosecutor will also invoke other forms of participation in Article 6(1) and 6(3) constituting the Prosecutor's strategy as described above to establish the charge of persecution..

Murder

245. Simon BIKINDI is charged with murder as crime against humanity under Article 3(a) of the Statute.

246. The Prosecutor submits that to prove murder as crime against humanity, the following specific elements need to be proved: (a) an unlawful act or omission of the accused or a subordinate of the accused caused the death of the victim; (b) the accused or the subordinate must have intended to kill or inflict grievous injury/harm to any person in reckless disregard of human life.[184]

247. Murder must be committed against a civilian as part of a widespread or systematic attack against a civilian population on discriminatory grounds described above.[185]

248. Concerning an accused person's participation in a joint criminal enterprise to "murder" (as the Prosecutor pleads, among other forms of participation), the Prosecutor submits that the crime of murder may be attributed to each individual participant in the joint criminal enterprise, including those not physically carrying out the murder.[186]

249. In establishing Simon BIKINDI's criminal liability for murder, the Prosecutor will rely not only on his participation in physically carrying out murders or in his

[183] Nahimana T.C. Judgment para 1080
[184] Akayesu T.C Judgment para 589, Celebici T.C. Judgment para 424,
[185] Akayesu T.C Judgment para 589
[186] See generally Tadic A.C Judgment paras 190-229 and the prosecutor's submissions regarding joint criminal enterprise as a form of participation under Article 6 (1) above

participation in a joint criminal enterprise, but also on other forms of participation in Article 6(1) and 6(3) constituting the Prosecutor's strategy as described above.

F. ADMISSIONS

257. The Prosecutor has filed a request for the Defence to specify facts they admit and those they intend to dispute, pursuant to Rule 73bis(B)(ii). We await the response of the Defence.

G. CONCLUSION

258. The Prosecutor respectfully submits this Provisional Pre-Trial Brief in which the factual allegations and the points of law and legal issues pertinent to the case against Simon BIKINDI are presented.

Dated this 15th July 2006
At Arusha, Tanzania.

William Egbe, Senior Trial Attorney

Amina Ibrahim, Case Manager

United Nations
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Case Name:	The Prosecutor vs. **BIKINDI**		**Case Number:** ICTR-2001-72-I	
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