International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: English

TRIAL CHAMBER II

Before: Judge Arlette Ramaroson, Presiding
Judge William Hussein Sekule
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 23 February 2007

The PROSECUTOR

v.

Joseph NZABIRINDA
Case No. ICTR-2001-77-T

SENTENCING JUDGEMENT

The Prosecution
Mr William Egbe
Ms Veronic Wright
Mr Patrick Gabaake
Mr Suleyman Khan
Ms Amina Ibrahim

The Defence
Mr François Roux
Mr Jean Haguma
Mr Célestin Buhuru
Ms Charlotte Moreau

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1. The Judgement in the case of *Prosecutor v. Joseph Nzabirinda* is rendered by Trial Chamber II of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule, and Judge Solomy B. Bossa.

I. Introduction

2. Joseph Nzabirinda (the "Accused") was born in 1957 in Sahera *secteur*, Ngoma *commune,* Butare *préfecture.*[1] He was a youth *encadreur* (organizer) in Butare *préfecture* from 1976 to 1992 and became Managing Director of SECOBE in Kigali. He was also a founding member of the *Parti Social Démocrate* ("PSD") in 1990.

3. On 21 December 2001, Joseph Nzabirinda was arrested in Brussels by the Belgian authorities based on an arrest warrant issued by Judge Navanethem Pillay,[2] which was annexed to an indictment dated 6 December 2001 confirmed by the same Judge on 13 December 2001.[3] The indictment contained four counts.[4] On 20 March 2002, the Accused was transferred to the United Nations Detention Facility in Arusha (the "UNDF"). On 27 March 2002, the Accused made his initial appearance and pleaded not guilty to all four counts.[5]

4. On 20 November 2006, the Prosecutor filed a motion to amend the indictment of 13 December 2001.[6] On 8 December 2006, the Chamber granted the motion and accepted the withdrawal of the previous indictment and the filing of a new indictment with one count of murder, as a crime against humanity.[7] Under the Amended Indictment, dated 9 December 2006 and filed on 11 December 2006 (the "Indictment"), Joseph Nzabirinda is only charged with aiding and abetting murder, a crime against humanity, under Articles 3 (a) and 6 (1) of the Statute of the Tribunal (the "Statute"), as an accomplice by omission in the preparation of the commission of the crime.

5. The Indictment alleges that after 19 April 1994 the Accused attended several "pacification meetings" in Sahera *secteur* where only the Hutu and killers of his *secteur* were present.[8] Following the meetings, systematic attacks were launched against Tutsi families living on the Accused's hill. During one of these attacks, the *Interahamwe* killed Pierre Murara near the

[1] T. 14 December 2006 p. 6.
[2] Warrant of Arrest and Order for Transfer and Detention, 13 December 2001.
[3] Decision on the Confirmation of the Indictment, 13 December 2001.
[4] The four counts are: genocide, complicity in genocide in the alternative, extermination as a crime against humanity and rape as a crime against humanity.
[5] T. 27 March 2002 p. 9.
[6] Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 72, 73, 50 and 51 of the Rules of Procedure and Evidence, filed on 20 November 2006. The same day, the Prosecution and the Defence filed a joint motion for consideration of a guilty plea agreement between Joseph Nzabirinda and the Office of the Prosecutor. On 27 November 2006, the Chamber issued a confidential Scheduling Order instructing the Prosecution to provide material in support of the new count of murder as a crime against humanity and to clarify certain aspects of the proposed amended indictment dated 20 November 2006, within three days. On 29 November 2006, the Prosecution requested an extension of time to provide the aforementioned supporting material. The Chamber granted an extension until 4 December 2006. On that date, the Prosecution filed the supporting material and a new proposed amended Indictment.
[7] Decision on the Prosecution's Under Seal and Confidential Motion For Leave to Amend the Indictment, 8 December 2006.
[8] Indictment, para. 14.

location of the "pacification meetings" where Joseph Nzabirinda was present as an "approving spectator".[9]

6. Joseph Nzabirinda is also charged with the murder of Joseph Mazimpaka killed near the Kabuga roadblock which he manned on two occasions after 19 April 1994, at the request of the authorities. The Indictment alleges that in appearing beside the killers at the roadblock as an "approving spectator," the Accused encouraged the murder.[10]

II. The Guilty Plea

A. Background

7. On 12 December 2006, the Parties filed a joint motion for consideration of a guilty plea and a plea agreement between Joseph Nzabirinda and the Office of the Prosecutor. The Motion sets forth the facts and the legal characterization for the Accused's guilty plea.

8. The Chamber notes that the provisions governing guilty pleas and plea agreements are Rule 62 (B) and Rule 62 *bis* of the Rules of Procedure and Evidence (the "Rules").[11]

9. On 14 December 2006, on his further appearance, Joseph Nzabirinda pleaded guilty to aiding and abetting murder, a crime against humanity, as accomplice by omission in the preparation of the commission of the crime.[12] The Chamber proceeded to verify the validity of the plea.[13]

10. The Chamber informed the Accused of the consequences of his plea. The Chamber stated that when an accused pleads not guilty, he is presumed innocent unless guilt is established beyond reasonable doubt. An accused who pleads not guilty therefore has a right to a fair trial, including, the right to cross-examine Prosecution witnesses, to call Defence witnesses, and to

[9] Indictment, para. 15.
[10] Indictment, paras. 18, 19.
[11] Rule 62: Initial Appearance of Accused and Plea
(B) If an accused pleads guilty in accordance with Rule 62 (A)(v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:
(i) is made freely and voluntarily;
(ii) is an informed plea;
(iii) is unequivocal; and
(iv) is based on sufficient facts for the crime and accused's participation in it, either on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case.
Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.
Rule 62 *bis*: Plea Agreement Procedure
(A) The Prosecutor and the Defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
(i) apply to amend the indictment accordingly;
(ii) submit that a specific sentence or sentencing range is appropriate;
(iii) not oppose a request by the accused for a particular sentence or sentencing range.
(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A)
(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty.
[12] T. 14 December 2006 p. 6.
[13] T. 14 December 2006 p. 6.

testify in his defence. The Chamber asked the Accused whether he understood that in entering a plea, he would renounce these rights. The Accused responded in the affirmative.[14]

11. Pursuant to Rule 62 (B)(i), (ii), and (iii) of the Rules, the Chamber first asked if the guilty plea was made freely and voluntarily that is, if the Accused was entering his plea knowingly and without threats or promises. The Accused responded that he had done so without threats or promises.[15]

12. Secondly, the Chamber asked the Accused if the plea was informed: that is if the Accused clearly understood the nature of the charges brought against him. The Accused responded in the affirmative.[16]

13. Thirdly, the Chamber asked whether the plea was unequivocal: that is whether the Accused understood that he could not challenge any facts alleged in the indictment. The Accused responded that his plea was unequivocal.[17]

14. In its oral ruling of 14 December 2006, the Chamber was satisfied that there was no material disagreement between the Accused and the Prosecution on the acknowledged facts forming the basis of the plea agreement, which facts were sufficient to establish the crimes and the Accused's participation in the crimes.

B. Applicable Law

1. Individual Criminal Responsibility for Aiding and Abetting

15. Article 6 (1) reflects the principle that criminal responsibility for any crime in the Statute is incurred not only by individuals who physically commit the crime, but also by individuals who participate in and contribute to the commission of the crime in other ways, such as aiding and abetting.[18]

16. Aiding and abetting is a form of accessory liability. The *actus reus* of the crime is not performed by the accused but by another person.[19] The accused's participation may take place at the planning, preparation or execution stage of the crime and may take the form of a positive act or an omission, occurring before or after the act of the principal offender.[20]

17. With respect to criminal responsibility incurred through omission, a person's mere presence at the crime scene may constitute aiding and abetting where it is demonstrated that his

[14] T. 14 December 2006 p. 7.
[15] T. 14 December 2006 p. 7.
[16] T. 14 December 2006 p. 7.
[17] T. 14 December 2006 p. 7.
[18] "Aiding" means assisting another to commit a crime. "Abetting" means facilitating, encouraging, advising or instigating the commission of a crime. The two terms are so often used conjunctively that they are treated as a single broad legal concept. (*Kajelijeli,* Judgement (TC), para. 765; *Semanza*, Judgement (TC), para. 384, referring to Mewett & Manning, *Criminal Law* (3rd ed. 1994) p. 272 (noting that aiding and abetting are "almost universally used conjunctively")).
[19] *Kunarać et al.,* Judgement (TC), paras. 391-392.
[20] *Kajelijeli,* Judgement (TC), para.766; *Semanza,* Judgement (TC), para. 385; *Rutaganira*, Judgement (TC) para. 64; The Prosecution is required to demonstrate that the accused carried out an act of substantial practical assistance, encouragement, or moral support to the principal offender, culminating in the latter's actual commission of the crime (*Kayishema and Ruzindana,* Judgement (AC), para. 186; *Kamuhanda*, Judgement (TC), para. 597; *Akayesu,* Judgement (TC), paras. 473-475; *Rutaganda,* Judgement (TC), para. 43. While the assistance need not be indispensable to the crime, it must have a substantial effect on the commission of the crime (*Bagilishema,* Judgement (TC), para. 33)

presence had a significant encouraging effect on the principal offender, particularly if the individual standing by was the superior of the principal offender or was otherwise in a position of authority.[21] In such circumstances, an omission to act may constitute the *actus reus* of aiding and abetting, provided that the failure to act had a decisive effect on the commission of the crime.[22] This form of criminal responsibility "is derived not from the omission alone, but from the omission combined with the choice to be present."[23]

18. Unlike other forms of aiding and abetting, "criminal responsibility as an 'approving spectator' does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct."[24]

19. The *mens rea* of an aider and abettor is demonstrated by proof of his knowledge that his act is assisting the commission of the crime by the principal offender.[25] The aider and abettor must have known the intent of the principal offender, and although he need not know the precise offence being committed by the principal offender, he must be aware of the essential elements of the crime.[26]

2. Murder as a Crime Against Humanity

a. General Elements of a Crime Against Humanity

20. For an enumerated act under Article 3 of the Statute to qualify as a crime against humanity, it must be proved that the crime was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

21. First, the Chamber recalls that 'attack' has been defined as "an unlawful act, event, or series of events of the kind listed in Article 3 (a) through (i) of the Statute."[27] The Chamber adopts the *Kajelijeli* Judgement's definition of "widespread" which is "large scale, involving many victims"[28] and of "systematic" which describes the organised nature of the attack.[29]

22. Second, the attack must be directed against a civilian population.[30] As stated in the *Semanza* Judgement, "a civilian population remains civilian in nature even if there are individuals within it who are not civilians."[31]

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[21] *Kajelijeli,* Judgement (TC), para. 769; *Furundžija,* Judgement (TC), paras. 34-35 ; *Mpambara,* Judgement (TC), para. 22.
[22] *Blaškic*, Judgement (TC), para. 284; *Tadić*, Judgement (TC), para. 686; *Akayesu,* Judgement (TC), para. 705.
[23] *Mpambara*, Judgement, (TC), para. 22.
[24] *Kayishema and Ruzindana,* Judgement (TC), para. 201; *Semanza* (TC), para. 386; *Bagilishema* (TC), paras. 34, 36 ; *Mpambara,* Judgement (TC), para. 23.
[25] *Blaškic*, Judgement (AC), para. 49; *Kayishema and Ruzindana,* Judgement (AC), para. 186.
[26] *Kajelijeli,* Judgement (TC), para. 768; *Semanza,* Judgement (TC), para. 388; *Bagilishema,* Judgement (TC), para. 32; *Kayishema and Ruzindana,* Judgement (TC), para. 201; *Kayishema and Ruzindana,* Judgement (AC), para. 186.
[27] *Kajelijeli*, Judgement (TC), para. 867; *Semanza*, Judgement (TC), para. 327.
[28] *Kajelijeli*, Judgement (TC), para. 871.
[29] *Kajelijeli*, Judgement (TC), para. 872.
[30] As noted in the *Blaškic* Judgement, "the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."(*Blaškic,* Judgement (TC), para. 214, cited in *Bagilishema*, Judgement (TC), para. 79 and *Kajelijeli*, Judgement (TC), para. 874.) Moreover, the term "population" does not require that crimes against humanity be directed against the entire population of a geographical territory or area (*Kajelijeli*, Judgement (TC), para. 875; *Bagilishema*, Judgement (TC), para. 80; *Tadić*, Judgement (TC), para. 644). The Trial Chamber in the *Semanza* Judgement further clarified that: "The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the

23. Third, the attack must be committed on discriminatory grounds. The Chamber recalls the *Akayesu* Judgement, where the "discriminatory grounds" element was considered to be jurisdictional in nature, limiting the jurisdiction of the Tribunal to crimes committed on "national, political, ethnic, racial or religious grounds."[32] Nonetheless, in the *Kajelijeli* Judgement the Chamber noted that:

> such acts committed against persons outside the discriminatory categories need not necessarily fall out with the jurisdiction of the Tribunal, if the perpetrator's intention in committing these acts is to support or further the attack on the group discriminated against on one of the enumerated grounds.[33]

24. Finally, with respect to the mental element of crimes against humanity, the Chamber agrees with the reasoning in the *Kajelijeli* Judgement that "the accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population."[34]

b. Murder

25. Murder is the intentional killing of a person by an act or an omission,[35] or the intentional infliction of grievous bodily harm, committed by the offender with knowledge that such harm is likely to cause the victim's death or with reckless disregard as to whether or not death will result, with no lawful justification or excuse.[36] The commission of a positive act is not an absolute requirement of criminal responsibility.[37] Murder is punishable as a crime against humanity when it has been committed as part of a widespread or systematic attack against a civilian population on discriminatory grounds.

26. The *mens rea* as an aider or abettor of murder, as a crime against humanity, is that the accused knew of the criminal intent of the principal perpetrator and knew that his actions or omissions assisted the principal to commit the crime.[38]

C. Findings

27. The Chamber noted that the facts contained in the Plea Agreement – from paragraphs 31 to 49- conformed to the facts contained in the Indictment in support of the count of murder- namely from paragraphs 1 to 20.

28. The Chamber stated that the requirements of Rule 62 (B) were met and it therefore declared the Accused guilty for having aided and abetted the crime of murder as a crime against

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enumerated act forms part of the attack." (*Semanza*, Judgement (TC), para. 330, cited in *Kajelijeli,* Judgement (TC), para. 875).

[31] *Semanza*, Judgement (TC), para. 330.

[32] *Akayesu*, Judgement (AC), paras. 464-465, also cited in *Kajelijeli*, Judgement (TC), para. 877.

[33] *Kajelijeli*, Judgement (TC), para. 878; *Rutaganda*, Judgement (TC), para. 74; *Musema*, Judgement (TC), para. 209; *Semanza*, Judgement (TC), para. 331.

[34] *Kajelijeli*, Judgement (TC), para. 880, *Semanza*, Judgement (TC), para. 332; *Musema*, Judgement (TC), para. 206; *Ntakirutimana et al.*, Judgement (TC), para. 803; *Bagilishema*, Judgement (TC), para. 94; *Kayishema and Ruzindana*, Judgement (TC), para. 134; *Kunarać et al.*, Judgement (AC), para. 102.

[35] *Kvočka et al*., Judgement (AC), para. 261 ; *Galić*, Judgement (AC), para. 149.

[36] *Akayesu* Judgement (TC), para. 586 ; *Ndindabahizi* Judgement, (TC), para. 487.

[37] *Galić,* Judgement (AC), para. 149.

[38] *Blaškic*, Judgement (AC), para. 49; *Semanza*, Judgement (TC), para. 388.

humanity of Pierre Murara and Joseph Mazimpaka pursuant to Articles 3 (a) and 6 (1) of the Statute.[39]

29. The Chamber found the Accused guilty of aiding and abetting the crime of murder as a crime against humanity based on the following reasoning.

30. The Accused admitted that following the meeting held by President Sindikubwabo in Butare *préfecture* on 19 April 1994, widespread killings of Tutsi and opponents of the regime began in the *préfecture* and in particular, in Sahera *secteur*.[40]

31. The Accused admitted that he attended several meetings at the Sahera *secteur* office where only Hutu and killers that the Accused knew as his neighbours were present. He admitted that he was present at such meetings as an "approving spectator."[41] He also admitted that, following the meetings, systematic attacks were launched on Tutsi families living on his hill. He further admitted that during one attack, Pierre Murara was murdered at a location close to the meeting place, where the Accused was present as an "approving spectator.[42]

32. Although he knew that systematic killings had occurred after the meetings, the Accused never stopped attending them, knowing that the purpose of the meetings was in reality to prepare and encourage the hunting down and killing of Tutsi. At the meetings, the Accused did not at any time or in no manner openly object to these killings.[43]

33. The Accused admitted that as a former youth *encadreur*, political personality, intellectual and a relatively affluent businessman, he did exert obvious moral authority over the population of his *secteur*, especially its youth, and over the country people living on his hill. The Accused also admitted that his presence at the meetings had a decisive influence on the criminal elements in their midst as he was a person held in high esteem by his fellow citizens, and with the circumstances prevailing in his *secteur*, conveyed the impression of his being an "approving spectator." He also knew that his silence would be considered by the assailants as tacit approval of the preparations for the killings.[44]

34. The Accused also admitted that after 19 April 1994, roadblocks were erected in his *secteur* and that he knew that they were used for identity checks and were one of the means employed in the campaign of killings in the *secteur*;[45] that, at the request of the authorities, he had manned the Kabuga roadblock on two occasions, along with some *Interahamwe* of Sahera *secteur*;[46] that he had encouraged the murder of Joseph Mazimpaka by Mugenzi near the Kabuga roadblock where the Accused was present as an "approving spectator."[47]

35. The Accused admitted that the murders of Joseph Mazimpaka and Pierre Murara were committed in his *secteur*, at a location close to those of the meetings and roadblocks respectively where he was present as an "approving spectator."[48]

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[39] T. 14 December 2006 p. 17.
[40] Plea Agreement, paras. 40, 41.
[41] Plea Agreement, paras. 43, 44.
[42] Plea Agreement, para. 44.
[43] Plea Agreement, para. 45.
[44] Plea Agreement, paras. 39, 46.
[45] Plea Agreement, para. 47.
[46] Plea Agreement, para. 48.
[47] Plea Agreement, para. 48.
[48] Plea Agreement, para. 49.

36. On the basis of the facts admitted by the Accused, the Chamber was convinced that widespread and systematic attacks had been carried out against a civilian population on discriminatory grounds in Sahera *secteur* in April 1994. The Chamber was also satisfied that the only logical conclusion to be drawn from the facts admitted by the Accused was that both Pierre Murara and Joseph Mazimpaka were murdered as a result of these attacks and because of their Tutsi ethnicity.

37. The Chamber was convinced that Joseph Nzabirinda knew that the *secteur* meetings, which he repeatedly attended, and the Kabuga roadblock, which he manned on two occasions were some of the means employed in the campaign of killings; that the murders of Pierre Murara and Joseph Mazimpaka were part of the widespread and systematic attacks against Tutsis civilians on ethnic ground; that the Accused knew the criminal intent of the perpetrators of the murders; that because of the moral authority he exercised, he knew that his presence at the Sahera *secteur* meetings and at the Kabuga roadblock would be crucial in encouraging the preparation and the commission of the murders.

38. On the basis of the facts acknowledged by the Accused with respect to the murders of Pierre Murara and Joseph Mazimpaka, the Chamber found the Accused criminally responsible not only for the attendance and encouragement that he provided as an "approving spectator" at the preparatory meetings but also for his presence as an "approving spectator" close to the locations where Pierre Murara and Joseph Mazimpaka were murdered.

39. The Chamber held that the Accused was criminally responsible, pursuant to Article 6 (1) of the Statute, for aiding and abetting the murders of Pierre Murara and Joseph Mazimpaka in Sahera *secteur* in April 1994.

III. Applicability of the *Non Bis in Idem* Principle to the Counts Withdrawn

40. On 14 December 2006, the Chamber indicated that it would address the question of the application of the *non bis in idem* principle to the counts that had been withdrawn in its sentencing judgement.[49]

A. Background

41. On 20 November 2006, the Prosecution requested the withdrawal of the counts of genocide, complicity in genocide, crimes against humanity (rape and extermination), with prejudice. It submitted that such withdrawal should trigger the application of the doctrine of *non bis in idem*.[50]

42. On 8 December 2006, the Chamber granted the withdrawal of the counts but determined that the prayer to declare that the withdrawal of counts attracted the application of the *non bis in idem* principle was premature at that stage of the proceedings.[51]

43. In the Plea Agreement, the Prosecution submitted that if the Chamber accepted Nzabirinda's plea, it would not refer the case to any other jurisdiction.[52]

[49] T. 14 December 2006 p. 17.
[50] Prosecutor's Request to Amend an Indictment, para. 4.
[51] Decision on the Prosecutor's Under Seal and Confidential Motion for Leave to Amend the Indictment, 8 December 2006, para. 13.
[52] Plea Agreement, para. 58.

44. On 14 December 2006, the Prosecution recalled that the Chamber, in its Decision of 8 December 2006, had granted the withdrawal of the counts of genocide, complicity in genocide, and crimes against humanity (rape and extermination). The Prosecution further submitted that, pursuant to Article 9 of the Statute, the Chamber should rule that the *non bis in idem* principle applies to counts withdrawn even though no trial on the merits had been held thereon.[53] The Prosecution submitted that, after five years of investigations, it would not succeed in proving the counts that had been withdrawn "because the evidence is not there."[54] The Defence supported the Prosecution application.[55]

B. Findings

45. The Chamber recalls that Article 9 (1) of the Statute prohibits against a second trial of an accused for the same serious violation of international humanitarian law. The *non bis in idem* principle applies to persons who have been tried by the ICTR (Article 9(1)), or to persons who have been tried before a national court (Article 9(2)) for acts constituting serious violations of international humanitarian law.[56]

46. As the Appeals Chamber observed, "the term 'tried' implies that proceedings in the national court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial a final judgement is rendered."[57] Accordingly, in the particular circumstances of this case where counts have been withdrawn without a final judgement, the principle of *non bis in idem* does not apply and cannot be invoked to bar potential subsequent trials of the accused before any jurisdiction.

47. In the instant case, the Chamber recalls that the charges were withdrawn when the Prosecution sought to amend the indictment under Rule 50 of the Rules and that a trial on the merits was yet to commence. The Chamber therefore denies the Prosecution's Motion.

IV. Issues Relating to the Sentence

48. On 17 January 2007, the Chamber held a Pre-Sentencing Hearing. The Chamber heard five character witnesses and admitted two witness statements under Rule 92 *bis* (A).[58]

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[53] T. 14 December 2006 p. 11.
[54] T. 14 December 2006 p.12.
[55] T. 14 December 2006 p.14.
[56] A person tried by a national jurisdiction under those circumstances may be tried by the ICTR only under certain conditions described in Article 9 (2)(a) and (b) of the Statute.
[57] *Semanza v. Prosecutor*, Decision (AC), 31 May 2000, para. 74 (footnotes omitted).
[58] On 11 December 2006, the Defence filed a motion for protective measures for its character witnesses, Witnesses LZI, LBH, LBG, CAN and LDK. The Chamber granted some of the measures sought in its Decision on the Nzabirinda's Under Seal-Extremely Urgent Motion for Protective Measures for Character Witnesses dated 13 December 2006. On 9 January 2007, the Defence and the Prosecution filed a joint Pre-Sentencing Brief in French. On 12 January 2007, the Defence filed a complementary Pre-Sentencing Brief. On 12 January 2007, the Defence filed a motion for protective measures for another character witness, Witness LZB2, which was partially granted by the Chamber in its Decision on the Defence's Extremely Urgent Confidential Motion for Protective Measures for Witness LBZ2 dated 16 January 2007. On 16 January 2007, the Defence filed a motion for the admission of Witness LBZ2's and Mr. Saidou Guindo's written statements in lieu of oral testimony under Rule 92 *bis* (A) and (B). In its oral decision of 17 January 2007, the Chamber granted the motion and admitted the written testimony of Witness LBZ2 and the attestation of good conduct of the Accused issued by Mr Saidou Guindo, Commander of the UNDF. On 17 January 2007, Witness Jean-Baptiste Nkuliyingoma (formerly known as LBH), Witnesses CAN, LZI, LDK and LBG testified. During the same hearing, the Defence orally moved the Chamber to vary its witness list so that the Witness bearing the pseudonym LDK, referred to in the Decision of 13 December 2006 be substituted by another witness who

A. Applicable Texts and Principles

49. The Tribunal was established to prosecute and punish the perpetrators of the atrocities in Rwanda in 1994 so as to end impunity.[59] It was also created to contribute to the process of national reconciliation, the restoration and maintenance of peace and to ensure that the violations of international humanitarian law in Rwanda are halted and effectively redressed.[60] The Chamber considers that a fair trial and, in the event of a conviction, a just sentence, contribute towards these goals. Deterrence, retribution and rehabilitation are fundamental principles considered by the Chamber when imposing a sentence.[61]

50. The Chamber will sentence Joseph Nzabirinda pursuant to the provisions of Articles 22 and 23 of the Statute and Rules 100 and 101 of the Rules. The Tribunal can only impose a prison term. Under Rule 101 (A) of the Rules, such a term shall not exceed life imprisonment. The Statute and the Rules do not provide for specific penalties for any of the crimes within the jurisdiction of the Tribunal.

51. Consequently, the determination of the sentence is left to the discretion of the Chamber. In exercising that discretion, the Chamber shall, however, pursuant to Article 23 (2) of the Statute and Rule 101 (B) of the Rules, consider a number of factors, including the gravity of the offence, any aggravating or mitigating circumstances, the personal circumstances of the convicted person and the general practice regarding prison sentences in the courts of Rwanda.

52. The Chamber understands its obligation to ensure that the sentence is commensurate with the individual circumstances of the offender.[62]

53. The Chamber recalls that aggravating circumstances must be proved beyond reasonable doubt, while mitigating circumstances must be proved on a balance of probabilities.[63]

B. Gravity of the Offence

1. Submissions

54. The Prosecution submitted that the gravity of the offence is the first element to consider in determining an appropriate sentence. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused person in the crime.[64] According to the Prosecution, the serious nature of the crime, and its impact on the victims, ought to be taken into consideration. [65]

2. Findings

55. The seriousness of the crimes and the extent of the involvement of Joseph Nzabirinda in their commission are factors to be considered in sentencing.

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would bear the same pseudonym, i.e. LDK and requested protective measures for that witness. The Chamber granted the motions.

[59] *Serugendo*, Judgement (TC), para. 31 citing *Rutaganda*, Judgement (TC), para. 455.

[60] Security Council Resolution 955, 8 November 1994.

[61] *Serugendo*, Judgement (TC), para. 33; *Aleksovski*, Judgement (AC), para. 185; *Mucić et al*, Judgement (AC), para. 806.

[62] *Mucić et al.*, Judgement (AC), para. 717; *Muhimana*, Judgement (TC), para. 594.

[63] *Kajelijeli,* Judgement (AC), para. 294.

[64] T.17 January 2007 p. 46.

[65] T. 17 January 2007 p. 46.

56. Genocide and crimes against humanity are inherently very serious offences because they are heinous in nature and shock the collective conscience of mankind.[66]

57. The Chamber finds that Joseph Nzabirinda's participation in aiding and abetting murder, as a crime against humanity, constitutes a very serious offence and a gross violation of international humanitarian law.

C. Aggravating Circumstances

1. Submissions

58. The Prosecution has indicated that it would not plead any aggravating circumstances other than those already accepted by the Parties in the Plea Agreement.[67] It argued that the presence of the Accused in the vicinity of the two murders as an "approving spectator" knowing that widespread and systematic attacks were under way, make the murder charge extremely serious.

59. Joseph Nzabirinda acknowledged the relevance of Paragraph 120 of the *Bisengimana* Judgement to his case, in the sense that he is an educated person who could appreciate the dignity and value of human life, and is aware of the need for and value of peaceful co-existence between communities.[68]

2. Findings

60. The Chamber is mindful that "where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing."[69]

61. It is well established in the Jurisprudence of the ICTR and ICTY that, while a position of authority by itself does not amount to an aggravating factor, the manner in which the accused exercised his command or the abuse of an accused's personal position in the community may be considered as aggravating factors.[70]

62. The Chamber considers that Joseph Nzabirinda - a youth organizer, an intellectual and a successful businessman held in high esteem in the community – had abused the obvious moral authority he exerted on the youth of his *commune* and the population of his *secteur.* The Chamber is of the view that Joseph Nzabirinda's abuse of position of influence constitutes an aggravating factor.

63. As the Defence has acknowledged, Joseph Nzabirinda "was an educated person who could appreciate the dignity and value of human life and was aware of the need for a peaceful co-existence between communities."[71] The Chamber considers this factor to be aggravating.

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[66] *Ruggiu*, Judgement (TC), para. 48.
[67] Plea Agreement, para. 59.
[68] T. 17 January 2007 p. 51.
[69] *Blaškić*, Judgement (AC), para. 693 cited in *Ndindabahizi*, Judgement (AC), para. 137.
[70] *Akayesu*, Judgement (AC), paras. 414-415, *Kambanda,* Judgement (TC), paras. 61, 62 quoted with approval in *Kambanda,* Judgement (AC) para. 119 ; *Aleksosvki,* Judgement (AC), para. 183 ; *Kayishema and Ruzindana,* Judgement (AC), paras. 357, 358 ; *Ntakirutimana et al*., Judgement (AC), para. 563 ; *Kamuhanda,* Judgement (AC), paras. 347-348; *Bisengimana*, Judgement (TC), para. 120 ; *Serugendo*, Judgement (TC), para. 48 ; *Ndindabahizi*, Judgement (AC), para. 136 .
[71] *Bisengimana*, Judgement, para. 120.

D. Mitigating Circumstances

1. Applicable Law

64. Mitigating circumstances may not be directly related to the offence.[72]

65. According to the jurisprudence of this Tribunal and that of the ICTY, a guilty plea may have a mitigating effect on the sentence, by: the showing of remorse,[73] repentance,[74] the contribution to reconciliation,[75] the establishment of the truth,[76] the encouragement of other perpetrators to come forward,[77] the sparing of a lengthy investigation and a trial and thus time, effort and resources,[78] and the fact that witnesses are relieved from giving evidence in court.[79] The timing of the guilty plea is also a factor to be considered in sentencing.[80]

2. The Guilty Plea and Public Expression of Remorse

a. Submissions

66. The Parties have argued that, in principle, a guilty plea should entail a reduction of the sentence; that a guilty plea is important to establish the truth; that, because the Accused has pleaded guilty before his trial, judicial time and resources have been saved; and that the plea contributes to the prevention of revisionism and contributes to the process of reconciliation.[81]

67. On 14 December 2006, in his further appearance before the Chamber, the Accused indicated his decision to change his initial plea of "not guilty," after long reflection in detention. He requested forgiveness from the families of the two victims, Pierre Murara and Joseph Mazimpaka, and from the people of Rwanda for the crimes for which he is responsible by his omission to act for which he suffers deep remorse. The Accused also expressed the hope that his guilty plea will assist and encourage others to commit themselves to the path of truth.[82] These elements were also stated in the Plea Agreement, in the Joint Sentencing Brief and during the Pre-Sentencing Hearing.[83]

b. Findings

68. The Chamber recalls that an acknowledgement of guilt may constitute proof of the perpetrator's honesty, that some form of consideration should be afforded to those who have confessed their crimes, in order to encourage others to come forward, and that a guilty plea may contribute to the process of national reconciliation in Rwanda.[84]

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[72] *Nikolić*, Judgement (TC), para. 145; *Deronjić*, Judgement (TC), para. 155.
[73] *Plavšić,* Judgement (TC), para. 73.
[74] *Ruggiu,* Judgement (TC), para. 55.
[75] *Plavšić,* Judgement, (TC), paras. 80-81.
[76] *Erdemović,* Judgement, (TC) (1998), para. 21; *Nikolic*, Judgement (TC), para. 248; *Serugendo*, Judgement (TC), para. 55.
[77] *Erdemović,* Judgement, (TC) (1998), para. 16; *Ruggiu,* Judgement (TC), para. 55.
[78] *Ruggiu,* Judgement (TC), para. 53.
[79] *Kambanda*, Judgement (TC), para. 54; *Serugendo*, Judgement (TC), paras. 52, 57.
[80] *Kambanda*, Judgement (TC), paras. 52,53; *Sikirica et al*., Judgement (TC), para.150 ; *Serugendo*, Judgement (TC), para. 54.
[81] *Mémoire conjoint*, paras. 21-23.
[82] T. 14 December 2006 p. 8.
[83] Plea Agreement, paras. 2-22 ; *Mémoire conjoint*, para. 33 ; T. 17 January 2007, p. 60.
[84] *Bisengimana*, Judgement (TC), para. 139.

69. For remorse to be considered mitigating, the Chamber must be satisfied that the remorse is sincere.[85]

70. After considering Joseph Nzabirinda's public expression of regrets and remorse for the crimes he committed, the Chamber is satisfied that Joseph Nzabirinda's expression of remorse is sincere.

71. The Chamber finds that Joseph Nzabirinda's change of plea to one of guilty together with public regrets and remorse constitutes recognition of his responsibility, has saved judicial time and resources, and may contribute to the process of national reconciliation in Rwanda. Therefore, the Chamber finds that Joseph Nzabirinda's guilty plea is a factor to be considered in mitigation of the sentence.

3. Cooperation with the Prosecution

a. Submissions

72. Joseph Nzabirinda has offered to cooperate with the Prosecution. Both Parties argued that this offer indicates his desire to participate in the effective search for truth and might encourage others to also confess their crimes.[86]

b. Findings

73. It is for the Trial Chamber to weigh the circumstances relating to any cooperation,[87] and "the evaluation of the accused's co-operation depends both on the quantity and quality of the information he provides."[88]

74. There is no dispute regarding Joseph Nzabirinda's offer to cooperate with the Prosecution in the future. However, at this stage of the proceedings, the Chamber considers that this offer cannot be considered as a mitigating circumstance in and of itself, insofar as there has been no demonstration of any substantial cooperation, within the meaning of Rule 101 (B)(ii), apart from the Guilty Plea which the Chamber has already taken into account.

4. Assistance Provided to Certain Individuals

a. Submissions

75. The Defence submitted that the Accused personally saved the lives of individuals[89] which the Prosecution does not dispute.[90]

76. The Defence called Witnesses CAN,[91] LZI[92] and LDK[93] to testify about Nzabirinda's role in assisting Tutsi refugees during the 1994 events. The statement of Witness LBZ-2, admitted under Rule 92 *bis,* corroborates the evidence of the above witnesses.[94]

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[85] *Banović*, Judgement (TC), para. 72 (footnotes omitted).
[86] Plea Agreement, para. 55 ; *Mémoire conjoint*, paras 24, 25.
[87] *Jelisić,* Judgement (AC), para. 124.
[88] *Blaškić* Judgement (TC), para. 774
[89] Plea Agreement, para. 50 ; *Mémoire conjoint*, paras. 26, 27.
[90] Plea agreement, para. 60.
[91] T. 17 January 2007 pp. 14-16.
[92] T. 17 January 2007 pp. 20, 21.
[93] T.17 January 2007 pp. 30-32.
[94] Defence Exhibit D.5.

b. Findings

77. After considering the testimonies of witnesses and a witness statement admitted under Rule 92 *bis*(A), the Chamber is of the view that there is sufficient evidence that Joseph Nzabirinda personally assisted Tutsi refugees by way of moral, financial and material support in Sahera *secteur* during the 1994 events and that he assisted in organising the departure of certain refugees to Burundi. According to the evidence submitted, Joseph Nzabirinda's acts contributed to saving the lives of some of the Tutsi refugees. Therefore, the Chamber finds that Joseph Nzabirinda's assistance to certain victims constitutes a mitigating factor.

5. Personal and Family Situation

a. Submissions

78. Both Parties argued that the jurisprudence of the Tribunal has taken into consideration, as mitigating factor, personal circumstances, such as the Accused's family situation as proof of his capacity for reintegration into society.[95]

79. The Defence called Witness LBG who testified favourably about Nzabirinda's personal and family situation.[96]

b. Findings

80. The Chamber notes that the fact that an accused is married and has children may, under certain circumstances, be considered mitigating.[97]

81. In the instant case, the personal and family situation of the Accused, a married man with children, leads the Chamber to believe in his chances of rehabilitation after his release. The Chamber therefore finds this personal situation to be a mitigating circumstance.

6. Lack of Personal Participation in the Crimes

a. Submissions

82. Both Parties argued that the Accused's omission is not a mitigating circumstance, but a mode of participation in the acknowledged crimes. However, referring to the *Bisengimana* Judgement, both Parties submitted that the particular circumstances of the case should be taken into account, including the mode and degree of the Accused's participation in the murders. They further submit that Nzabirinda did not commit any violent act during the massacres and did not personally participate in committing the two murders to which he has pleaded guilty, but in their preparation. Although the murders were committed close to the respective sites of the meetings and the roadblock, where the Accused was present, he did not "watch" the murders.[98]

83. The Accused admitted that he was present not at the crime scene, but at the preparatory meeting for that crime:[99] He was, therefore, not physically present at the venue of the murder, but at the meeting and at the roadblocks where those crimes were prepared.[100]

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[95] *Mémoire conjoint*, paras. 28-31.
[96] T. 17 January 2007 pp. 35-40.
[97] *Kunarać et al*., Judgement (AC), para. 362; *Vasiljević*, Judgement (TC), para. 300; *Serushago*, Judgement (TC), para. 39; *Rutaganira*, *Jugement* (TC), paras. 120-121.
[98] *Mémoire conjoint*, paras. 34-36.
[99] T. 17 January 2007 p. 49.
[100] T. 17 January 2007 p. 50.

b. Findings

84. The Chamber is mindful of the need to take into account the particular circumstances of the case, including the form and the degree of the Accused's participation in the crime.[101]

85. The Chamber recalls that Joseph Nzabirinda did not personally commit the two murders or any violent act related to the murders. However, the Chamber finds that Joseph Nzabirinda who aided and abetted the preparation of the murders at meetings, and the commission of the crimes while being in the vicinity, had full knowledge that the *secteur* meetings and the Kabuga roadblock were used in the campaign of killings raging in Sahera *secteur* at the time. The Chamber is mindful that Joseph Nzabirinda participated in the *secteur* meetings and manned the Kabuga roadblock, knowing that his presence would lend obvious moral authority to the killers, signal approval of the killings and provide encouragement to the assailants. The Chamber also considers that Joseph Nzabirinda did not disassociate himself from those who organised the attacks during the *secteur* meetings, which he attended nor from the assailants who murdered Joseph Mazimpaka near the roadblock that he manned. The Chamber further recalls that Joseph Nzabirinda did not stop attending the so-called "pacification meetings" while he knew that they prepared the systematic hunting down and killing of Tutsi.

86. In accordance with the jurisprudence of the Tribunal, the "approving spectator" doctrine requires "actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime."[102] In that respect, the Chamber recalls that Joseph Nzabirinda admitted that Pierre Murara was killed by the *Interahamwe* near the location where the meetings were held and where he was present as an "approving spectator"[103] and that, in appearing beside the killers at the roadblock, he encouraged the murder by Mugenzi of Joseph Mazimpaka near the roadblock that he was manning and while he was present.[104] Based on these admitted facts, the Chamber considers that Joseph Nzabirinda's presence as an "approving spectator" in the vicinity of the crime scenes, encouraged the preparation and the commission of the murders of Pierre Murara and Joseph Mazimpaka. Accordingly, the Chamber rejects the Defence arguments that the fact that Joseph Nzabirinda was not physically present at the venue of the murder is a mitigating factor as it is established that he was in the immediate vicinity of the crime scenes and knew that he would encourage the commission of the crimes.

87. Therefore, the Chamber does not consider that this form of participation warrants consideration as a mitigating factor in sentencing.

7. Character of the Accused, Attitude Towards Tutsi Before and During Events, Lack of Prior Criminal Convictions and Good Conduct in Detention

a. Submissions

88. Both Parties submitted that Nzabirinda was a person of good character with no history of extremism prior to the events of 1994.[105] The Parties further submitted that prior to the 1994

[101] *Mucić et al.,* Judgement (AC), para. 731 quoting *Kupreskić*, Judgement (AC) para. 442 ; *Aleksovski,* Judgement (TC), para. 243.
[102] *Kayishema and Ruzindana,* Judgement (TC), para. 201; *Semanza,* Judgement (TC), para. 386; *Bagilishema,* Judgement (TC), paras. 34, 36 ; *Mpambara,* Judgement (TC), para. 23.
[103] Plea Agreement, para. 44. See also Indictment, para. 15.
[104] Plea Agreement, para. 48. See also Indictment, para. 19.
[105] Plea Agreement, para. 56.

events, the Accused was considered by the persons with whom he was close to be a good, open and generous man, popular both on a professional and a personal level.

89. The Parties submitted that the Accused was indifferent to ethnicity, never discriminated on that basis and had excellent relationships and friendships with Hutu and Tutsi alike. Further, the Accused's wife is Tutsi and the relations he had with his family-in-law went further than simple cordiality.

90. While it has been impossible to obtain the Accused's criminal record, the Defence submitted that the Accused has a clean record and has never been convicted. Further, as attested by Saidou Guindo, the UNDF Commanding Officer, the Accused was well-behaved during his five year detention.[106]

91. Defence Witnesses Jean-Baptise Nkuliyingoma,[107] LZI[108] and LBG[109] testified favourably about Nzabirinda's good character.

b. Findings

92. On the basis of the witnesses' testimonies, the Chamber is satisfied that Joseph Nzabirinda was a person of good character before his involvement in the crimes committed in Sahera *secteur* in April 1994, with no history of ethnic discrimination. The Chamber is also satisfied, on balance, that Joseph Nzabirinda had no previous criminal record. Finally, the Chamber considers that the statement of the UNDF Commanding Officer demonstrates Joseph Nzabirinda's good conduct while in detention. The Chamber finds that these factors constitute mitigating circumstances.

8. Circumstances of Necessity

a. Submissions

93. The Parties submit that, if the Accused had directly opposed the events in Sahera *secteur* there would have been a real risk that he or a member of his close family would have been killed. Indeed, as a PSD party member he was personally threatened, and a target for the *Interahamwe* and the soldiers who were responsible for the massacres in Butare. Further, the lives of the Accused's wife, a Tutsi, and their children were also threatened. Therefore the Parties submitted that the prevailing circumstances faced by the Accused and his family should be considered as a factor in mitigation of the sentence.

94. Witness LZI testified that Nzabirinda was threatened during the events.[110] Joseph Nzabirinda also submitted in court that he was under psychological pressure, which forced him to take part in meetings and to go to the roadblocks in order not to confirm the suspicion that being a member of the PSD party was equivalent to being an accomplice of the enemies.[111]

b. Findings

95. The Chamber considers that this submission in respect of prevailing circumstances of necessity contradicts the facts in the Plea Agreement in which Joseph Nzabirinda acknowledged

[106] Defence Exhibit D. 6 admitted under Rule 92 *bis*; T. 17 January 2007, pp. 42, 43.
[107] T. 17 January 2007 pp. 3-7.
[108] T. 17 January 2007 pp. 17-22.
[109] T. 17 January 2007 pp. 35-40.
[110] T. 17 January 2007 pp. 18, 19.
[111] T. 17 January 2007 p. 60.

that he attended several meetings at the Sahera *secteur*; that he never stopped attending those meetings even though he knew that systematic killings resulted from the first meeting; at no time or in any manner did he openly object to the killings at such meetings; and he knew that his silence would be regarded by the killers as tacit approval of the preparations for the killings.[112] Moreover, Joseph Nzabirinda admitted that he manned the Kabuga roadblock twice, at the request of the authorities, whereas he knew that roadblocks were one of the means employed in the campaign of killings in the *secteur*.

96. The Chamber notes that the Plea Agreement does not assert that Joseph Nzabirinda was compelled, under duress, to a criminal conduct. The Chamber is not convinced by the testimony of Witness LZI that Joseph Nzabirinda had no option but to attend the meetings and to man the Kabuga roadblock. The Chamber therefore rejects this purported mitigating circumstance.

E. Sentencing Recommendations by the Parties

97. Both Parties recommend a term of imprisonment ranging from five to eight years' imprisonment, with credit given for time already served and that he serve his sentence in a European country, preferably in France, as it is close to Belgium, where the Accused's wife and children reside. The Parties are aware that this is entirely within the Chamber's discretion.[113] Both acknowledge that the Chamber is not bound by their sentencing recommendations.[114]

98. The Prosecution submitted that the Chamber should consider the objectives of retribution, deterrence and rehabilitation in sentencing.[115] The Prosecution added that the agreement of the Parties regarding the recommended sentencing range is reasonable and consistent with the practice of both this Tribunal and the ICTY. In *Furundzija*, the Trial Chamber sentenced the Accused, who was a person of authority, to eight years' imprisonment for encouraging, by his presence, outrages upon personal dignity and rape. In *Rutaganira*, the Accused was found guilty and sentenced to a term of six years' imprisonment for having encouraged, by his presence and by omission, the perpetration of extermination as a crime against humanity.

99. The Defence submitted that the Accused has no blood on his hands, exercised no *de jure* authority and is charged with the murders of only two persons and not with extermination, as in the *Bisengimana* case.[116]

100. Citing a judgement from the Cyangugu High Court in Rwanda dated 29 April 2005, the Defence further submitted that the Chamber should apply the lower scale of the sentencing range.[117] In that case, Athanase Murwanashyaka who was charged with very serious offenses, including murder, extermination, and rape, was found guilty of genocide. Following a guilty plea, Athanase Murwanashyaka was sentenced to seven year's imprisonment, with credit for three and-a-half years already spent in detention. The Defence emphasized that the facts related to the crimes for which Athanase Murwanashyaka was charged are not commensurate with the case at bar.

[112] Plea Agreement, paras. 45-46.
[113] Plea Agreement, para. 60 ; *Mémoire conjoint*, paras. 48-53 and p. 12.
[114] Plea Agreement, para. 64; *Mémoire conjoint*, para. 13.
[115] T. 17 January 2007 p. 45.
[116] T. 17 January 2007 p. 50.
[117] T. 17 January 2007 p. 49.

101. The Defence submitted that Articles 82 and 83 of the Rwandan Penal Code provide that, where mitigating circumstances are accepted or admissible, the death penalty shall be replaced by a sentence of no less than five years' imprisonment; a sentence of life imprisonment shall be replaced by a sentence of no less than two years' imprisonment; and a sentence of up to 25 years' imprisonment shall be reduced to a sentence of no more than one year's imprisonment.[118]

F. Findings

1. The General Sentencing Practice in the Courts of Rwanda

102. The Chamber recalls Article 23 of the Statute and Rule 101 of the Rules, which obliges the Tribunal to take into account the general practice regarding prison sentences in the courts of Rwanda.

103. Under the Rwandan Penal Code, serious offences, such as murder, carry a maximum sentence of death or life imprisonment, depending on the nature of the accused's participation.[119] Article 89 of the Code specifically provides that accomplices may be subject to the same sentence as the principal perpetrator.

104. The Chamber considers that the Rwandan Organic Law setting up "*Gacaca* Jurisdictions"[120] may be relevant for the sake of comparison in the instant case because it addresses the procedure for persons pleading guilty to crimes against humanity. A person who aided to commit an offence,[121] may, after pleading guilty and under certain conditions,[122] be sentenced to a prison sentence of seven to twelve year's imprisonment.[123]

2. Conclusion

105. The Chamber is mindful that sentences of like individuals in like cases should be consistent. However, it is also mindful that the Appeals Chamber in the *Kupreškic* Judgement held that a Chamber is "under no obligation to expressly compare the case of one accused to that of another,"[124] and notes that "any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual."[125] The Chamber also understands its obligation to ensure that the sentence is commensurate with the individual circumstances of the offender.[126]

106. The Chamber recalls that it has found Joseph Nzabirinda's participation in aiding and abetting murder, as crimes against humanity, constitutes a very serious offence and is a gross violation of international humanitarian law.

107. The Chamber also found that Joseph Nzabirinda's moral authority in the community and the fact that Joseph Nzabirinda is an educated person are aggravating factors. However, the

[118] T. 17 January 2007 p. 59.
[119] *Code Pénal Rwandais*, *Décret-Loi* n° 21/77, 18 August 1977, modified by *Décret-Loi* n° 23/81, 13 October 1981, Articles 311-317.
[120] Organic Law N°16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994. (Organic Law of 19 June 2004)
[121] Article 51 of Organic Law of 19 June 2004.
[122] Article 56 of the Organic Law of 19 June 2004.
[123] Article 73 of the Organic Law of 19 June 2004.
[124] *Kupreškic*, Judgement (AC), para. 443.
[125] *Kvočka*, Judgement (AC), para. 681.
[126] *Mucić et al.*, Judgement (AC), paras. 717-719; *Muhimana,* Judgement (TC), para. 594.

Chamber further found the following circumstances to be mitigating: Joseph Nzabirinda's guilty plea accompanied by a public expression of remorse, his personal and family situation, his good character prior to the 1994 events, his lack of prior criminal convictions, his good conduct in detention, and the assistance he provided to certain victims.

108. Nonetheless, while Joseph Nzabirinda's personal circumstances (personal and family situation, good character, lack of prior criminal conviction and good conduct in detention) are relevant in the mitigation of the sentence, the Chamber is of the view that such factors cannot play a significant role in mitigating international crimes and the weight to be accorded to them is limited.[127]

109. The Chamber is mindful of the reasoning in the *Semanza* Judgement that a higher sentence is likely to be imposed on "one who orders rather than merely aids and abets exterminations."[128] The Chamber further recalls that "the modes of liability may either augment (*e.g.*, commission of the crime with direct intent) or lessen (*e.g.*, aiding and abetting a crime with awareness that a crime will probably be committed) the gravity of the crime."[129]

110. On examination of the sentencing practice of this Tribunal and that of the ICTY, the Chamber notes that principal perpetrators convicted of crimes against humanity, such as murder, have received sentences ranging from ten years' to life imprisonment.[130] Persons convicted of secondary forms of participation have generally received lower sentences.[131] The Chamber is mindful that the sentence should reflect the totality of the criminal conduct of the accused.[132]

111. However, the Chamber recalls that, it did not accept, in the instant case, Joseph Nzabirinda's form of participation as a mitigating circumstance. The Chamber considers that Joseph Nzabirinda's presence amounts to a very serious form of participation that relates to a cognizant, a positive choice. The Chamber also considers that Joseph Nzabirinda did not disassociate himself from those who organised the attacks during the *secteur* meetings, which he attended nor from the assailants who murdered Joseph Mazimpaka near the roadblock that he manned. Moreover, the Chamber finds that Joseph Nzabirinda knew that his presence and moral authority would encourage the killers to execute their crimes.

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[127] *Banović,* Judgement, (TC), para. 76 (footnotes omitted); *Ntakirutimana*, Judgement (TC), para. 898; *Bisengimana*, Judgement (TC), para. 175.
[128] *Semanza,* Judgement (AC), para. 388.
[129] *Ndindabahizi*, Judgement (AC), para. 122 (foootnote omitted).
[130] *Muhimana*, Judgement (TC), para. 618; *Ntakirutimana et al.*, Judgement (TC), paras. 922, 924.
[131] Laurent Semanza was sentenced to eight years' imprisonment for instigating the murder of six persons as a crime against humanity *(Semanza,* Judgement (TC), para. 588); Vincent Rutaganira was sentenced to six years' imprisonment after having pleaded guilty to complicity by omission in extermination as a crime against humanity (*Rutaganira*, *Jugement* (TC), *Dispositif*); Elizaphan Ntakirutimana was sentenced to ten years' imprisonment for aiding and abetting genocide (*Ntakirutimana et al.,* Judgement (TC), paras. 790, 921), and this sentence has been upheld by the Appeals Chamber (*Ntakirutimana et al.,* Judgement (AC), para. 570.); Paul Bisengimana was sentenced to 15 years' imprisonment after having pleaded guilty to aiding and abetting extermination as a crime against humanity (*Bisengimana*, Judgement (TC), para. 203); Joseph Serugendo was sentenced to six years' imprisonment after having pleaded guilty to direct and public incitement to commit genocide and persecution as a crime against humanity (*Serugendo*, Judgement (TC), Section VI).
[132] *Mucić et al.,* Judgement (AC), para. 772.

3. Credit for Time Served in Custody

112. Pursuant to Rule 101 (D) of the Rules, "credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal."

113. The Chamber considers 21 December 2001 as the beginning of Joseph Nzabirinda's detention, this being the date on which he was arrested and detained. The Chamber recognizes that Joseph Nzabirinda is entitled to credit for the time in detention since this date, including any additional time that he may serve pending an appeal.

V. Verdict

114. Recalling the guilty verdict of 14 December 2006;

115. Having considered the Statute and the Rules, the general practice regarding prison sentences in Rwanda, the Parties' pre-sentencing submissions and the evidence;

116. Having weighed the gravity of the offence, the aggravating and mitigating circumstances, the Chamber convicts and sentences Joseph Nzabirinda for the single count of murder, as a crime against humanity, pursuant to Article 3 (a) of the Statute, to a sentence of

Seven years' imprisonment

117. The Chamber finds that Joseph Nzabirinda is entitled to credit for the time spent in detention from 21 December 2001 to the date of this judgement.

118. In accordance with Rule 102 (A) of the Rules, the sentence shall run as of the date of this judgement.

119. Pursuant to Rule 103 of the Rules, Joseph Nzabirinda shall remain in the custody of the Tribunal, pending a decision on where his sentence will be served, pursuant to Article 26 of the Statute and Rule 103 (A). The Chamber has noted the Parties' submissions, with respect to the recommended State in which the sentence will be served, but recalls that the President of the Tribunal, in consultation with the Chamber, will designate the State. The Government of Rwanda and the designated State shall be so notified by the Registrar.

120. Pursuant to Rule 102 (A) of the Rules, if notice of appeal is given, the enforcement of this judgement shall be stayed until the decision on appeal has been delivered, while the convicted person remains in detention.

Done in English

Arusha, 23 February 2007

Arlette Ramaroson	William H. Sekule	Solomy B. Bossa
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

Annexes

A. Jurisprudence and Defined Terms

1. ICTR

Prosecutor v. Akayesu, Case No.ICTR-96-4-T, Judgement (TC), 2 September 1998.

Prosecutor v. Akayesu, Case No.ICTR-96-4-A, Judgement (AC), 1 June 2001.

Prosecutor v. Bagilishema, Case No. CTR-95-1A-T, Judgement (TC), 7 June 2001.

Prosecutor v. Bisengimana, Case No.ICTR-00-60-S, Judgement and Sentence (TC), 13 April 2006.

Prosecutor v. Kajelijeli, Case No. ICTR-99-44-T, Judgement (TC), 1 December 2003.

Prosecutor v. Kajelijeli, Case No. ICTR-99-44-A, Judgement (AC), 23 May 2005.

Prosecutor v. Kambanda, Case No. ICTR- 97-23-S, Judgement (TC), 4 September 1998.

Prosecutor v. Kambanda, Case No. ICTR-97-23-A, Judgement (AC), 19 October 2000.

Prosecutor v. Kamuhanda, Case No. ICTR-95-54-T, Judgement (TC), 22 January 2004.

Prosecutor v. Kamuhanda, Case No. ICTR-95-54-A, Judgement (AC), 19 September 2005.

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement (TC), 21 May 1999.

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-A, Judgement (AC), 1 June 2001.

Prosecutor v. Mpambara, Case No. ICTR-01-65-T, Judgement (TC), 11 September 2006.

Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgement (TC), 28 April 2005.

Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgement (TC), 27 January 2000.

Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Judgement (TC), 15 July 2004.

Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-A, Judgement (AC), 16 January 2007.

Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, Judgement (TC), 25 February 2004.

Prosecutor v. Ntakirutimana et al., Cases No. ICTR-96-10-T and ICTR-96-17-T, Judgement (TC), 21 February 2003.

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2. ICTY

Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement (TC), 25 June 1999.

Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000.

Prosecutor v. Banović, Case No. IT-02-65/1S, Judgement (TC), 28 October 2003.

Prosecutor v. Blaškić, Case No. IT-94-14-S, Judgement (TC), 3 March 2000.

Prosecutor v. Blaškić, Case No. IT-94-14-A, Judgement (AC), 29 July 2004.

Prosecutor v. Deronjić, Case No. IT-02-61-S, Judgement (TC), 30 March 2004.

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Prosecutor v. Kunarać et al., Case No. IT-96-23-T & 96-23/1-T, Judgement (TC), 22 February 2001.

Prosecutor v. Kunarać et al., Case No. IT-96-23-A & 96-23/1-A, Judgement (AC), 12 June 2002.

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Prosecutor v. Vasiljević, Case No. IT-98-32-S, Judgement (TC), 29 November 2002.

3. Defined Terms

Chamber
Trial Chamber II

Indictment
Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-I, Amended Indictment, filed on 11 December 2006 in English and French.

Plea Agreement
Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-I, Plea agreement between Joseph Nzabirinda and the Office of the Prosecutor, filed on 12 December 2006.

Prosecutor's Request for Leave to Amend an Indictment
Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-I, Prosecutor's Request for Leave to Amend an Indictment Pursuant to Rules 72, 73, 50 and 51 of the Rules of Procedure and Evidence, filed on 20 November 2006.

Joint Sentencing Brief -*Mémoire conjoint*
Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-T, *Mémoire conjoint entre Joseph Nzabirinda et le Bureau du Procureur préalable au prononcé de la sentence* filed on 9 January 2007.

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T.
Official transcripts of the proceedings in English unless otherwise indicated.

B. Indictment