

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO.: ICTR-01-72-A
APPEALS CHAMBER

SIMON BIKINDI
v.
THE PROSECUTOR
OF THE TRIBUNAL

WEDNESDAY, 30 SEPTEMBER 2009
0900H
APPEALS HEARING

Before the Judges:

Patrick Robinson, Presiding
Mehmet Güney
Fausto Pocar
Daqun Lui
Theodore Meron

For the Registry:

Ms. Félicité Talon
Mr. Issa Mjui

For the Prosecution:

Mr. Alex Obote-Odora
Ms. Dior Fall
Mr. François Nsanzuwera
Ms. Florida Kabasinga
Mr. Abdoulaye Seye

For the Appellant Simon Bikindi:

Mr. Andreas O'Shea

Court Reporters:

Ms. Sithembiso Moyo
Ms. Janice Dickman
Ms. Sherri Knox
Ms. Kirstin McLean

PROCEEDINGS

1

2 MR. PRESIDENT:

3 Will the registrar call the case, please.

4 MS. TALON:

5 Good morning, Mr. President, good morning, Your Honours.

6

7 The Appeals Chamber of the International Criminal Tribunal for Rwanda, composed of
8 Judge Patrick Robinson, presiding, Judge Mehmet Güney, Judge Fausto Pocar, Judge Lui Daqun and
9 Judge Theodore Meron, is sitting today, Wednesday, 30th September for the hearing in the case of
10 Simon Bikindi versus the Prosecutor, case number ICTR-01-72-A.

11

12 Thank you, Mr. President.

13 MR. PRESIDENT:

14 And may I inquire whether Mr. Bikindi can hear the proceedings.

15

16 Mr. Bikindi, can you hear and follow the proceedings?

17 THE APPELLANT:

18 Yes, I am with you.

19 MR. PRESIDENT:

20 May I have the appearances for Mr. Bikindi.

21 MR. O'SHEA:

22 Good morning, Mr. President, good morning, Your Honours. Welcome to Arusha. My name is
23 Andreas O'Shea, and I am a member of the bar of England and Wales, and I am counsel for
24 Mr. Bikindi. I appear with Ms. Golriz Ghahraman, who is a legal assistant in this case, and she is a
25 member of the bar of New Zealand. Thank you.

26 MR. PRESIDENT:

27 Thank you very much.

28

29 And for the Prosecution.

30 MR. OBOTE-ODORA:

31 May it please the Court. Good morning, Mr. President. Appearing for the Prosecution, I am
32 Alex Obote-Odora. I am appearing with the lead counsel, Dior Fall, together with
33 François Nsanzuwera, Florida Kabasinga and Abdolaye Seye. Thank you, Your Honours.

34 MR. PRESIDENT:

35 And today we hear the appeal of Mr. Bikindi and the Prosecutor against the trial judgement rendered on
36 the 2nd of December 2008 by Trial Chamber III. Both Mr. Bikindi and the Prosecution filed notices of
37 appeal on the 31st of December 2008. The appeals deal with Mr. Bikindi's responsibility for publicly

1 exhorting the killing of Tutsis on the Kivumu-Kayove road in late June 1994, using a vehicle outfitted
2 with a public address system in two distinct incidents.

3
4 Based on his conduct, the Trial Chamber found Mr. Bikindi guilty of direct and public incitement to
5 commit genocide under count 4 of the indictment. The Chamber dismissed all other counts and
6 sentenced Mr. Bikindi to 15 years of imprisonment.

7
8 Mr. Bikindi has advanced six grounds of appeal against his conviction. He also challenges his
9 sentence. He requests as relief that his conviction be overturned, or in the event that it is upheld, that
10 the Appeals Chamber order a reduction of his sentence.

11
12 In the first two grounds he challenges the Trial Chamber's reliance on the evidence of witnesses AKK
13 and AKJ for its finding that he publicly exhorted the killing of Tutsis on the Kivumu-Kayove road in late
14 June 1994.

15
16 In the third ground Mr. Bikindi argues that the Trial Chamber erred in failing to take judicial notice of the
17 evidence relating to *Operation Torquoise*. He argues that this evidence brings into question his
18 conviction for the Kivumu-Kayove road incidents.

19
20 In the fourth ground he argues that the Trial Chamber committed a number of errors of fact and law in
21 assessing Defence evidence, specifically that the Trial Chamber erred by failing to give sufficient weight
22 to the evidence of Defence witnesses regarding Mr. Bikindi's movements in June 1994, the
23 Defence evidence relating to his participation in a meeting in Kivumu in 1993, and the evidence of
24 Charles Zilimwabagabo.

25
26 In the fifth ground Mr. Bikindi argues that his case was prejudiced by ineffective assistance of
27 co-counsel. And in his sixth ground of appeal Mr. Bikindi challenges the Trial Chamber's finding that he
28 was perceived to be an influential member of the MRND and that he was held in high esteem by the
29 *Interahamwe*. He also appeals his sentence.

30
31 The Prosecution opposes Mr. Bikindi's grounds of appeal and contends that they should be dismissed.
32 The Prosecution also appeals Mr. Bikindi's sentence. It submits that the Trial Chamber erred in law
33 and in fact by imposing a sentence not proportionate to the gravity of the offence Mr. Bikindi committed
34 and is inconsistent with the sentence in practice of the Tribunal and the Rwandan courts.

35
36 The Prosecution also submits that the Trial Chamber erred in failing to take into account the absence
37 of any mitigating factors and the existence of certain aggravating factors. It requests the

1 Appeals Chamber to increase Mr. Bikindi's sentence in the range of 30 years to imprisonment for the
2 remainder of his life.

3

4 Mr. Bikindi argues that the Prosecution's appeal should be dismissed.

5

6 Counsel may argue the grounds of appeal in any order they consider more suitable for their
7 presentation. But counsel should not repeat verbatim or summarise extensively the arguments
8 presented in their briefs.

9

10 The Appeals Chamber is familiar with the arguments. We have had the briefs, and I make a special
11 plea for both parties to present focussed arguments.

12

13 The hearing will proceed as follows: First, submission of counsel for Mr. Bikindi for up to
14 1 hour and 30 minutes. After a pause of 20 minutes, the Prosecution will respond for up to
15 one and a half hours. And then counsel for Mr. Bikindi will reply for up to half an hour.

16

17 In the afternoon, we will hear the Prosecution appeal starting at 3 o'clock for up to 30 minutes, and
18 counsel for Mr. Bikindi will then respond for up to 30 minutes, and the Prosecution may reply for
19 10 minutes.

20

21 Mr. Bikindi will then be given 10 minutes to make an address to the Court, should he wish to do so.

22

23 Mr. O'Shea, you may begin with your presentation.

24 MR. O'SHEA:

25 I am most grateful, Mr. President. I would like to just outline a few preliminary matters, if I may. The
26 first is this: That there are a few national authorities that I intend to refer to. In order not to waste the
27 Court's time, I will ask my assistant to arrange with Mr. Issa that these authorities are placed in front of
28 you while I am talking, with Your Honours' permission, rather than hand them up now.

29 MR. PRESIDENT:

30 That's fine.

31 MR. O'SHEA:

32 Thank you.

33

34 The next matter is this: A few minutes before Your Honours entered the courtroom, I was approached
35 by the coordinator of this Chamber and I was notified of the fact that an e-mail was sent at around
36 3 o'clock yesterday afternoon from Mr. Momo. Mr. Momo, as you will be aware, is the former
37 co-counsel in this case and is indirectly subject of ground 5 of appeal, ineffective assistance of counsel.

1 And the effect of the email is an application to act as *amicus curae* in this hearing. I say no more than
2 that.

3 MR. PRESIDENT:

4 You said the effect of the email is what?

5 MR. O'SHEA:

6 Is to request to act as *amicus curae* in this hearing. I say that I have not read in totality the email. I was
7 shown very briefly a copy of it this morning. And I don't know its content, but that appears to be the
8 thrust of it. It's not a matter which particularly concerns me at the moment, but I thought it would be
9 important for Your Honours to be aware of it at least, and we can decide if and how that should be
10 addressed later.

11 MR. PRESIDENT:

12 Counsel, the Chamber will deal with it at the appropriate time. Please proceed.

13 MR. O'SHEA:

14 I will briefly -- may it please Your Honours, just to draw to your attention how I intend to proceed with
15 the time which has been allocated to me.

16

17 I will begin by addressing grounds one and two cumulatively by (a), highlighting the essence of the
18 point and (b), addressing the principle that the Trial Chamber may accept part of the evidence and
19 reject another part.

20

21 I will then proceed in the second phase of my submissions to address the consequences of this
22 Appeals Chamber upholding part of our submissions but not upholding other parts. In other words, I
23 will address the issue of what should occur if Your Honours feel that there is a difficulty with the
24 treatment of the evidence of AKK but not a difficulty with the treatment of the evidence of AKJ and
25 vice-versa.

26

27 In the third part of my submissions, I will deal with grounds three and four, but I will only address
28 two specific points. First, the route through Nyamirambo, and secondly, the meeting of 1993 in Kivumu.

29

30 The fourth aspect of my submissions will address the question in ground five of ineffective assistance of
31 counsel. And there I will add to what we have already said in our reply brief with respect to the test, the
32 appropriate test. I will also attempt in a very simple fashion to identify for Your Honours where in this
33 case the line can be drawn between incompetence, impact on the trial and miscarriage of justice.

34

35 And then, lastly, on the question of ineffective assistance of counsel, I will add to what we have already
36 said about the question of whether -- and should we have, that is, Mr. Bikindi and his counsel,
37 addressed this issue during the trial.

1 The fifth part of the submissions will deal with a discrete but important point relating to the purport and
2 effect of a procedural error when addressing the issue of Mr. Bikindi's relationship with the MRND.

3
4 And, finally, we will supplement written submissions on sentencing, but each of these matters will be
5 dealt with briefly, and I hope not to extend to the time which has been accorded to me.

6
7 With regard to the first and second grounds of appeal, I would begin by recalling to this Chamber its
8 judgement in the Media case, and with specific reference to Mr. Ngeze, where this Appeals Chamber
9 thought it appropriate to quash an allegation against Mr. Ngeze of a very similar nature to that against
10 Mr. Bikindi in that it involved a loud speaker on a vehicle. And the reason for quashing the conviction
11 was on the basis that it had not been established when the offence was committed.

12
13 Now that is the essence and the thrust of the submissions of the Defence in the first and second
14 grounds of appeal. The problem is the timing, because in the Bikindi case, in the first status conference
15 that I attended, the Prosecution appropriately admitted that Mr. Bikindi was not in the country until the
16 12th of June of 1994. And, of course, in the indictment itself, the offence was specified to have
17 occurred in late June 1994.

18
19 Now, just briefly to recall to Your Honours and those listening where our difficulty arises. It arises
20 because the Trial Chamber thought it appropriate to give the Accused the benefit of the doubt that a
21 priest named Gatore did not die in the month of June 1994. And, in fact, we say that since the evidence
22 of Shadreck Bizimana, who was a Defence witness, not protected, was accepted, that it must be taken
23 that the Trial Chamber accepted that that man died in the month of April 1994.

24
25 Having made that finding, the Trial Chamber then went on to make the irrational finding, in our
26 submission, that it had no difficulty with the credibility of Witness AKK and found that the incident in
27 question, the public speaker incident, occurred in late June 1994.

28
29 The difficulty here is that AKK stated that Gatore died in the month of June and not in the month of
30 April, as had been accepted by the Chamber for the benefit of the Defence. But the Chamber did not
31 see any obstacle in relation to that. So we say that was an irrational finding.

32
33 Basically, I draw your attention -- I draw Your Honours' attention and I invite Your Honours to consider
34 what I am saying when looking again at the transcript of AKK. Your Honours will observe, when looking
35 at the transcript of AKK, that when AKK is asked about the timing of the public speaker incident, he
36 places it in the month of June, but he says "I believe." So he places it in the month of June but not with
37 the highest degree of certainty. At the same time when Your Honours go through that transcript,

1 Your Honours will observe that the question of when Mr. Gatore died, according to AKK, he was
2 effectively flogged to death. And AKK insisted that that man died in the month of June. Not only did he
3 insist that the man died in the month of June, but he also insisted that he died the day after the incident
4 with Mr. Bikindi; that he was not far away from the incident of the killing of Gatore which took place at
5 the parish, and that it was the killers themselves who boasted to him that Gatore was dead. And it is in
6 those circumstances that we say that no reasonable Tribunal could make a finding accepting
7 AKK's evidence that Bikindi did what he did in the month of June 1994 and at the same time reject that
8 Gatore died in 1994, for the purposes of another witness. Because in AKK's story the death of Gatore
9 was absolutely crucial to his story and central to how he timed Bikindi's incident. And that is where the
10 irrationality arises.

11
12 Of course, the Chamber addressed the issue of credibility. It did not apparently address the issue of
13 reliability. Sometimes it is said before this Chamber that a Trial Chamber does not need to state every
14 detail of its reasoning. And we agree. However, a trial chamber must state the central pillars of its
15 reasoning and address central difficulties in the evidence.

16
17 The issue of credibility.

18 MR. PRESIDENT:

19 Just a minute, Mr. O'Shea.

20

21 Judge Meron.

22 JUDGE MERON:

23 What is your conclusion with regard to Mr. Bikindi of this apparent contradiction that you have been
24 talking about?

25 MR. O'SHEA:

26 Conclusion with regard to the verdict?

27 JUDGE MERON:

28 Yes.

29 MR. O'SHEA:

30 My conclusion is that since Mr. Bikindi only entered the country on the 12th of June, it cannot be
31 established that Mr. Bikindi committed this offence. And, therefore, on the evidence of AKK, he would
32 have to be acquitted -- or, rather, the conviction would have to be quashed. I can deal with the issue of
33 how that interrelates with AKJ in a moment, if Your Honour pleases.

34

35 So coming to the question of reliability. Why is that so important here? Well, it is important here
36 because we must not forget the standard of proof, the standard of proof of beyond all reasonable doubt.
37 And in the context of that standard of proof where you have an inconsistency in the evidence of this

1 nature, in my submission, the Trial Chamber should have asked themselves this question:
2 Number one, do we believe AKK? If prima facie, we believe of AKK, then it's a problem of credibility.
3 We say there is because of AKK's insistence on the month of June. However, they should have gone
4 on to the next question of equal importance, the question of reliability.

5
6 On this basis, is there a reasonable explanation as to why AKK would be telling the truth and at the
7 same time Mr. Bikindi did not commit this offence? And the explanation is this: It is that on the basis of
8 the transcripts of AKK's evidence, Your Honours will observe that the issue of the identity of Bikindi was
9 not fully established.

10
11 Now, under normal circumstances, it would not have to be fully established in order for the Prosecution
12 to prove their case. Well, I say that in a sense -- in a sense it does. But what I am arguing today would
13 not be the case if we were not faced with this issue of rationality. But if we are faced with this issue of
14 two possible inconsistent findings in the judgement, then, in my submission, if there is a reasonable
15 explanation as to why AKK would be telling the truth and at the same time Bikindi did not commit the
16 offence, then the Trial Chamber has to give the Defence the benefit of a doubt.

17
18 In this case, AKK had seen Bikindi for the first time in 1992. His evidence was that he had heard that
19 Bikindi was going to be giving a concert. And then he went to that concert. We have no further
20 evidence as to how he observed or identified Bikindi at the concert, or over what length of time he
21 observed Mr. Bikindi at the concert. Crucial issues, if one is to consider the likelihood of recognition
22 over the period of a year, given that this is the one and only time the witness could have seen him. The
23 next time he sees Bikindi is in 1993 in Kivumu.

24
25 Now, the difficulty with 1993 in Kivumu is the fact, as stated in the transcripts, that the witness was
26 500 metres away from Bikindi speaking. Now, the Trial Chamber had just addressed that argument in
27 its judgement. And what it said was, "Well, that didn't matter because there was a loud speaker. But
28 what I say is this: 500 metres away when he is hearing Bikindi, in the stadium when he sees Bikindi. It
29 is not established how he knows that the voice he heard was Bikindi's voice. Did he recognise that
30 voice from one year earlier? Or what, in fact, occurred? When you go through the transcripts carefully,
31 Your Honours will observe that there is a nagging doubt in that respect.

32
33 When Mr. Bikindi comes to Court, Your Honours will observe he is not identified in court. It is not really
34 the fault of anybody. It's just that it was observed during the proceedings that the witness may have
35 seen the Trial Chamber President speak to Mr. Bikindi. And so the exercise of identifying Bikindi in the
36 dock was not done. Not that it would have necessarily made much difference, given Bikindi's attire, in
37 any event. But the point is this: On the transcripts of AKK it is reasonably open to the Trial Chamber to

1 conclude that AKK is telling the truth and Bikindi did not commit the offence.

2
3 Now, let me address what I think this issue is going to revolve around to some extent in
4 Your Honours' minds, which is the often stated principle before this Appeals Chamber: That a
5 Trial Chamber is entitled to accept one part of the evidence and reject another part, whether that be
6 within the context of one witness or several. And that is, of course, the principle that we entirely accept.
7 However, we say that one has to look at the circumstances.

8
9 It is not always in every instance that a Trial Chamber is entitled to do that. There may be instances
10 where doing that would amount to irrationality, or doing that would amount to ignoring the standard of
11 proving a criminal case. There may be instances where you have two contradictory pieces of evidence
12 or two pieces of evidence that are so closely tied together, that to accept one part and reject another
13 part would be effectively to change the standard of proof into that balance of probabilities because you
14 would be choosing the most appropriate scenario, rather than establishing the case beyond all
15 reasonable doubt. That is the case here. Because of this absolute solid line between the death of
16 Gatore and the evidence of AKK, in our submission, the Trial Chamber was not entitled to accept that
17 Gatore died in April for the purposes of one witness's evidence, but accept that Bikindi committed this
18 offence for the purpose of AKK, for the reasons that I outlined earlier.

19
20 Apart from that particular aspect of it, we, of course, have a rather strange situation in this
21 Trial Chamber judgement, because if Your Honours refer -- and I won't repeat the argument -- but if
22 Your Honours refer to our reply brief, you will see how we explain this. In fact, in this particular case the
23 Trial Chamber did not reject AKK's evidence on the date of the death of Gatore.

24
25 If Your Honours read what was said by the Trial Chamber as quoted in our reply brief, it is, at a
26 minimum, unclear. But it appears to us that what the Trial Chamber is saying is that they, in fact, have
27 no difficulty with AKK's evidence that Gatore died in June, despite the fact that they have given the
28 benefit of the doubt to the Defence for the purposes of analysing another witness. I need not go any
29 further into this particular aspect, grounds one and two, unless Your Honours wish to raise any specific
30 issues in relation to grounds one and two, or I proceed and you may have questions later.

31 MR. PRESIDENT:

32 Proceed.

33 MR. O'SHEA:

34 Mr. President, thank you.

35
36 What I will now address is what has not been addressed in our briefs, but which is the inevitable
37 question which Your Honours might face. Your Honours will observe that the Defence has raised a

1 number of grounds of appeal. Some of those grounds of appeal relate more to AKK than AKJ, and
2 others relate more to AKJ than to AKK.

3
4 The first and second ground of appeal, we say that AKK -- AKJ's evidence falls as a result of
5 AKK's evidence. But let me ask -- let me pose this rhetorical question as to what would occur if
6 Your Honours said, "Yes, I think there is some difficulty here with the evidence of AKK." This situation
7 is not safe. But then you look at the situation of AKJ, the argument on ineffective assistance of counsel,
8 and you say, "Well, we are not really persuaded by the arguments of counsel on ineffective assistance
9 of counsel." So, where does that leave AKJ? Or vice-versa, the arguments which are specifically
10 related to AKJ you feel should be sustained, but the argument which I have just expressed the essence
11 of a moment ago with relation to AKK, you say, "No. No, that is not right." What happens then?

12
13 Well, first of all, in our submission, if you read the judgement faithfully, as I know Your Honours will, and
14 it is clear in our submission that, according to the Trial Chamber, they were convinced because AKK
15 and AKJ mutually corroborated each other. In any instance, although one witness can convict a man
16 even on a serious offence, but in any instance -- of course, there are instances when more caution is
17 exercised than in others, but in any instance, caution should be exercised. And the Trial Chamber quite
18 properly recognised the caution that must be exercised of convicting on one witness.

19
20 But in our submission in this particular instance, there were difficulties in the evidence of both
21 witnesses, but the Trial Chamber was persuaded because of the similarities between the evidence and
22 the corroboration between the two witnesses. So if one of the witnesses falls, it is not, in our
23 submission, for this Chamber to replace its view on how the evidence of one witness should be viewed.

24
25 The consequence, in our submission, would be either to send it back for re-trial or, in the alternative, to
26 quash the conviction. But that may be a matter of discretion for Your Honours.

27
28 The second point is this: AKK and AKJ say that Bikindi says different things. In the case of AKK words
29 are used which, without going into the actual words themselves, words are used which quite clearly and
30 effectively calls for the extermination of the Tutsi. Words are used which quite clearly constitute in law
31 a call to commit genocide. And that we accept. We also accept that if you look at the words of AKJ
32 together with the words of AKK, and you take it in the context that AKK is looking at one part of the
33 journey and AKJ is looking at another part of the same journey, which was the finding of the
34 Trial Chamber, we say that in those circumstances it is again, at least by inference, clear that there is
35 no other reasonable conclusion that Bikindi was, in fact, calling for genocide. But you have to read
36 those two sentences together, the two sentences that he made on the journey up and on the journey
37 down. And we make that concession, we believe rightly, and that is why we did not make a submission

1 in that respect in our arguments.

2
3 But if AKK falls, then one is left with a statement as follows: "Have you killed the Tutsis here?" And the
4 question arises, in the absence of the evidence of AKK to clarify the matter, is there no other
5 reasonable conclusion than that Bikindi had genocidal intent? Now this may be viewed as a technical
6 point, and I don't like making technical points, but the point is there.

7
8 Your Honours addressed the issue of the definition of direct and public incitement in the Media case.
9 And there must be -- for direct and public incitement to genocide, there must be a direct call for
10 genocide, not just a direct call to kill.

11
12 Your Honours pointed out that it has to be looked at in the context, and we perfectly accept that, and
13 that is why we made the concession that I just made a moment ago. But we say that with just those
14 words, the Prosecution did not provide sufficient evidence to establish a context which would draw one
15 to the conclusion that, "Have you killed the Tutsis here?" Necessarily, in Bikindi's mind, must have
16 meant "commit genocide". And, in fact, here I am not attacking the Trial Chamber because the
17 Trial Chamber found -- made its finding on the basis of AKK and AKJ.

18
19 And Your Honours will observe that even the Trial Chamber itself accepted a distinction. Your Honours
20 will observe that when expressing the words by AKJ, Their Honours said this was a direct call to kill and
21 then went on to discuss the context.

22
23 With regard to AKK, the Trial Chamber accepted this was a direct call to destroy part of the Tutsi
24 population. So the Trial Chamber did recognise the distinction. And the relevant question here is, what
25 is the context? Has the Prosecution proved a sufficient basis for the context to say that expression or
26 that question necessarily amounts to a call to genocide in the mind of Bikindi? Right. Recalling
27 Your Honours' previous jurisprudence that there must be no other reasonable explanation for the intent
28 of the Accused.

29 MR. PRESIDENT:

30 How else would you interpret the question, "Have you killed the Tutsi?"

31 MR. O'SHEA:

32 "Have you killed the Tutsi here?" Well, it would be speculation as to why a person would say such a
33 thing. And I don't feel very comfortable giving these examples, but one example would be, "Have you
34 killed the Tutsis here? Ha-ha". Knowing fully well that there were no Tutsis there. So it could have
35 been a joke at a political rally that Bikindi expressed at those around him.

36
37 "Have you killed the Tutsis here?" It could be an expression of surprise. "Have you killed the Tutsis

1 here" could be a direct call to kill. Question: Is it a direct call to destroy part of the Tutsi population -- a
2 substantial part of the Tutsi population? That would depend on Bikindi's state of knowledge.

3
4 Between the 12th of June when he arrived in Rwanda and the time of this offence -- not clear how
5 much time has passed, what did Bikindi learn? Is it a reasonable explanation if Bikindi were to give this
6 explanation? But we are talking hypothetically. But would it be a reasonable explanation for him to
7 say, "Well, I knew there was a war going on. I knew the Tutsis had attacked. I knew that there were
8 killings of Tutsis. I knew there were killings of Hutus." It wasn't happening at Gisenyi. It was
9 happening somewhere else. Remember this is June 1994, not April 1994, and this was the head of the
10 government -- or, rather, this area was the area where the government was based or a substantial part
11 of the government was based.

12
13 People like Nzirorera, for instance, lived -- and that is not without saying anything about the allegations
14 against Mr. Nzirorera, but having regard to his official position within the political party, lived in Gisenyi.
15 Others of importance like Serushago lived in Gisenyi. So in those circumstances one might ask, how
16 many Tutsis were actually there in June?

17
18 In that context -- in the absence of other proof from the Prosecution, can it really be determined that
19 Bikindi knew there was a genocide going on? We say that is not a necessary conclusion. We could
20 draw that conclusion looking retrospectively, but could we, as a Rwandan turning up in Rwanda on the
21 12th of June in Gisenyi and not moving from Gisenyi, know the full circumstances of everything that
22 was going on?

23
24 The Trial Chamber, when looking at AKK and AKJ together, said, "Well, Bikindi must have known what
25 was going on." The Trial Chamber does not clarify what it means by "what was going on".

26 MR. PRESIDENT:

27 But why have you characterised this as a technical point?

28 MR. O'SHEA:

29 Well, I have clarified it as a technical point because if Bikindi had said "Have you killed the Tutsis
30 here?" That would be an incitement to murder. It would be morally wrong. That's why I have classified
31 it as a technical point. But perhaps "classified" is a wrong word. I have accepted that the public may
32 view it as of a technical nature. If it were accepted that a man says to someone "kill", then, obviously,
33 that is bad, it is wrong, it is morally wrong and it is illegal. But Bikindi is not charged with that in respect
34 of this incident. He was not convicted of that in respect of this incident. Before this Appeals Chamber
35 the only question is: Has he committed direct and public incitement to commit genocide?

36
37 I say, by the way, Mr. President, and just so that this is clear, that in the story of AKK -- and this would

1 become relevant when we talk about sentencing. There is reference to Mr. Bikindi saying some words
2 at a roadblock.

3
4 Your Honours will recall that from Your Honours' previous jurisprudence, particularly in the Media case,
5 that so far as words uttered at a roadblock are concerned, that does not constitute direct and public
6 incitement. If it is simply words of a supervisor to those manning the roadblock, that would constitute
7 instigation. And that is something which Your Honours said in the Media case at paragraph 862.

8
9 So the point being technical or not, it's not the crime we are dealing with. And it would be a point which
10 would have to be addressed by this Appeals Chamber, whether or not Bikindi could have hypothetically
11 been found guilty of incitement to murder.

12
13 Does that answer Your Honour's question?

14 MR. PRESIDENT:

15 Yes. But no doubt the Prosecution will address this point.

16 MR. O'SHEA:

17 Yes.

18 MR. PRESIDENT:

19 Judge Meron.

20 JUDGE MERON:

21 Counsel, you are arguing that he did not, on the same occasion, refer to rising up and looking
22 everywhere possible.

23 MR. O'SHEA:

24 What I am saying, Your Honour, is that if Your Honours find yourselves in the predicament where you
25 do not accept the evidence of AKK, then, yes, that is the position. Of course, if AKK is there, it's quite
26 different.

27 JUDGE MERON:

28 And you would argue that this, taken alone, would not be a sufficient basis for the conviction of public
29 and direct incitement to commit genocide.

30 MR. O'SHEA:

31 Well, it would be public and it would be direct, but it would not be a direct call to commit genocide.

32 JUDGE MERON:

33 It's okay.

34 MR. O'SHEA:

35 The other issue which would have to be considered, of course, is whether the Prosecution would have
36 sufficiently particularised the crime of Bikindi in the indictment. If we were left in the scenario, we have
37 just been left with those words, question mark.

1 And, finally, if we look at AKJ and we say, okay, we have a problem with the evidence of AKJ, what is
2 the position with AKK if AKK stands alone? There, Your Honours, the problem is of a slightly different
3 nature. There, AKK talks about early June, not late June. So it would be difficult to convict making -- if
4 AKK's evidence is not there, it would be difficult to convict on that basis alone, given that the indictment
5 in the case of the Prosecution was late June and that in early June, at least for the most part of it,
6 Bikindi was not there.

7
8 Now with respect to the -- with respect to the third and fourth grounds of appeal. I said that what I
9 would do is I would make two specific points. The first specific point relates to the route through
10 Nyamirambo. Now, the Appeals Chamber is in difficulties here. I recognise that. The
11 Appeals Chamber is in difficulties with regard to geography, and this would often be the case. But there
12 are two things that we say about that route. We say that the journey going from Nyundo where Bikindi
13 was housed to down the road to Kivumu and then on to Kayove would involve, given the nature of the
14 exercise with all those buses, et cetera, which would involve a number of hours of journey time there
15 and back, probably more than six.

16
17 Now a site visit was conducted by the Trial Chamber. And one of the principal purposes of this site visit
18 was to establish distances and geography. But we don't have any record in this case as to how that
19 turned up. As I have frankly admitted in the pleadings, we were given a video. That video I was not
20 given officially. It wasn't given to me by case management. It was given to me by the man who took
21 the video. It appeared to me as a friendly gesture, but it may have been that the Appeals Chamber
22 asked him to do it. I don't know. I don't remember, in fact. That video was a random collection of
23 moments during the site visit which probably helpfully recalled the Judges as to the various aspects of
24 the case. But that video did not, in any sense, provide us with a record of distances, perspective
25 relationship between different places and so fourth, which I think was in a sense one of the most
26 important aspects of this site visit.

27
28 It's relevant, first of all, because Kayove lies on the route to Kibuye. And the Security Council
29 resolutions that we referred to involving the movement of *Opération Turquoise* troops, would, we say,
30 involve the -- necessarily implicate those troops going down the same road that Bikindi went down in
31 the direction of Kibuye, if they were coming from Ngoma.

32
33 It's relevant, secondly, because there is a substantial amount of Defence evidence which was not
34 effectively challenged, we say, to the effect that Bikindi would simply go out to stretch his legs. He
35 would only go out for short periods. He would go and visit members of the ballet, which were living
36 across the road, on a daily basis, but he would never be away for long. And that context -- that
37 Defence evidence sits very uncomfortably with the case against Bikindi because of the extent of this

1 journey that would be required in order for him to commit this crime.

2
3 Now, the Trial Chamber said, "Well, they can't account for all of his movements". And that goes without
4 saying, how can anybody account for anybody else's every movement unless they are in an official
5 position and they have a secretary? There is a bar as close as you get, the domestic servant living in a
6 house, other people living in a house with Bikindi describing his general patterns of movements and
7 saying he was basically there all the time. He went out to stretch his legs. He would go out no more
8 than a few hours. He would always be back before 5 o'clock. That may not punch a dead bullet into
9 the Prosecution's case. But, of course, that's not the Defence obligation.

10
11 The Defence obligation is to raise a reasonable doubt. So the duty of the Trial Chamber is not to ask
12 itself, is there any possible way this offence could have been committed and all these people don't
13 know about it? The question that needs to be asked is: Having regard to the Defence evidence and
14 having regard to the Prosecution evidence, how do we view the Defence evidence? Do we believe the
15 Defence witnesses? If we do, is it likely that this substantial journey would have taken place in this
16 context as described by these Defence witnesses?

17
18 If you have rock-solid evidence of the commission of a crime and the Defence evidence is not believed,
19 which I think was substantially the case in *Kamuhanda*, for example, you have a situation like that, then
20 I can understand taking a strict approach and saying, "Well, unless the Defence has blocked up all the
21 doors, this evidence doesn't mean anything." But in this instance that is not the case.

22
23 The Defence witnesses who gave evidence on Bikindi's actual activities and Bikindi's actual movements
24 were not, as far as I can see from the judgement, disbelieved. It's just that the Trial Chamber said they
25 couldn't account for all his movements. So those are the two aspects to this route. And the absence of
26 a record of the site visit creates a problem for us and creates a problem for Your Honours and, indeed,
27 for the Prosecution. I don't even know if the Prosecution has seen this video I referred to.

28
29 So the way I am going to deal with this is this: I am going to, here and now -- I won't sit down, but I will
30 make -- they can come back at the appropriate time. I am going to here and now invite the Prosecution
31 to make admissions. I am going to invite the Prosecution because they are counsel, they are in a
32 position to do so, to make admissions, first of all, that the map and facts stated by my assistant and
33 annexed to one of the documents is an accurate reflection of the geographical position. And I am also
34 going to ask them to note the admission that if troops of *Opération Turquoise* were going from Ngoma
35 to Kibuye, they would have to pass through Kivumu and Kayove. It is up to them how they react. If
36 they say we are not prepared to make those admissions, well, I am here formally inviting this Chamber
37 to organise another site visit for this Chamber. But it is a matter which can be dealt with on a

1 wait-and-see basis. Your Honours can have --

2 MR. PRESIDENT:

3 You will never have persuaded me to do that. I can tell you.

4 MR. O'SHEA:

5 I knew that would be the case, Your Honour. I knew that Your Honours and, indeed, myself, would be
6 reluctant to go through that exercise because I have already done it and I know what it involves, and I
7 don't want to do it again. And in Your Honour's position, I wouldn't want to either.

8 MR. PRESIDENT:

9 Did you raise the question of the absence of any record of the site visit at the trial? Because I notice
10 you were counsel at the trial.

11 MR. O'SHEA:

12 Yes.

13 MR. PRESIDENT:

14 Yes to what?

15 MR. O'SHEA:

16 No. No. The absence of any record of the site visit -- I did not raise the issue of the absence of the
17 record of the site visit. I worked on the premise that Prosecution counsel were there, that Prosecution
18 counsel are counsel, and that in my closing brief when I described the issue of distances and
19 geography, it will not be contested by the Prosecution. And the issue of the absence of a site visit has
20 only become prejudicial as a result of the way the Trial Chamber addressed the issue in their
21 judgement. Because, first of all, the Trial Chamber was in a position, in my submission, during its
22 deliberations to consider the question of judicial notice. It was not foreclosed from that because of its
23 prior decision.

24

25 And, secondly, the Trial Chamber made the statement in its judgement that the fact that the
26 Defence witnesses could not account for all of Bikindi's movements was a sufficient basis for not finding
27 their evidence relevant to the issue -- or, persuasive of the issue, rather. So essentially -- and I will
28 come back to this, ineffective assistance of counsel. But essentially, some problems arise as a result of
29 the judgement. When we make our closing briefs -- sorry, Your Honour.

30 MR. PRESIDENT:

31 Just a minute.

32

33 Judge Meron.

34 JUDGE MERON:

35 Counsel, do you contend that the Trial Chamber's failure to keep records of the site visit indicates that
36 they could not possibly have properly considered the geographical layout of the Kivumu-Kayove road,
37 or they could have?

1 MR. O'SHEA:

2 I wouldn't dare make such a suggestion, Your Honour. The suggestion I would make would be that we,
3 the parties, are in an impossible position. We cannot see that that has been done. And justice must
4 not only be done, but must be seen to be done. How can we, as the parties, analyse the judgement or
5 contest its contents if there is not a record of part of the trial? That's where the problem lies and that is
6 where the prejudice lies. I can't say that the Judges didn't take proper account of everything on the site
7 visit. I just simply don't know. And in law, I ought to know.

8 JUDGE MERON:

9 Have you raised this matter in your notice of appeal, Counsel?

10 MR. O'SHEA:

11 We raised it in our arguments. Did we raise it in our notice of appeal? We may not have raised that
12 specific point expressly in our notice of appeal. I don't actually remember. But we did raise it in our
13 argument and we raised the ground of appeal, failing to take into account relevant evidence that was at
14 part C, including the activities of *Opération Turquoise*. And also we raised the evaluation of
15 Defence evidence in our grounds of appeal. And, in my submission, the site visit reasonably falls within
16 those grounds.

17 MR. PRESIDENT:

18 Is there any reference in the judgement at all to the site visit?

19 MR. O'SHEA:

20 I believe there is, Your Honour.

21

22 It is at paragraph 32 of the judgement and it comes under annex A, procedural history. And I just read
23 for the record, since these proceedings are public so that the public knows what is happening here. At
24 the status conference held on the 8th of November 2007 --

25 MR. PRESIDENT:

26 Sorry. Just a minute.

27

28 Yes, proceed.

29 MR. O'SHEA:

30 "At the status conference held on the 8th of November 2007, the parties informed the Chamber that in
31 their joint opinion, a site visit was necessary. The Chamber requested the parties to file a joint itinerary
32 by the 15th of November 2007.

33

34 "On the 6th of December 2007 the Chamber granted the Defence's request for a site visit in Rwanda
35 and requested the President of the Tribunal to authorise the Chamber to exercise its function away from
36 the seat of the Tribunal.

37

1 "On the 12th of March 2008 the President authorised the site visit in Rwanda, from the
2 14th to the 18th of April 2008, in accordance with the Chamber's decision."

3
4 In my respectful submission, in order for there to be a fair trial -- because I submit this is a fair trial
5 issue -- any part of the trial, whether it is conducted at the seat of the Tribunal or elsewhere, must have
6 a proper record. I accept that a site visit would not necessarily have the same kind of record as within
7 the courtroom, but it must have a proper record. In the absence of a proper record, then in order for the
8 Appeals Chamber -- a proper record must be taken, in any event. But I think Your Honour's question is
9 probably directed at a miscarriage of justice. And when the Appeals Chamber is considering whether
10 there has actually been a miscarriage of justice as a result of a failure to make a record, then the
11 Trial Chamber, not having made the --

12 MR. PRESIDENT:

13 Is this the only reference to the site visit? I am not really the authorisation for the site visit.

14 MR. O'SHEA:

15 I am not really entirely sure, Your Honours. I would have a look at that and confirm it later. But --

16 MR. PRESIDENT:

17 Judge Güney has a question.

18 MR. O'SHEA:

19 Yes.

20 JUDGE GÜNEY:

21 Counsel, Bikindi never said, in the course of the trial, the fact that the presence of a contingent of the
22 *Opération Turquoise* would have prevented him from acting. Regarding the site visit, Prosecution,
23 amongst other things, submits that Bikindi did not demonstrate any prejudice relating to the records. I
24 would like to know your take on these two ideas that I have just referred to.

25 MR. O'SHEA:

26 With regard to the first aspect, Your Honours will observe that *Opération Turquoise* was discussed
27 during the trial. The example, which is the easy example to refer to because it falls within the domain of
28 what we are talking about and not this specific issue, but if falls within the documents Your Honours will
29 be looking at.

30
31 Your Honours will note that in the cross-examination of AKK, Mr. Nderitu, counsel for Bikindi, raised the
32 issue of *Opération Torquoise* with Witness AKK during the course of his cross-examination. So the
33 issue was raised. It wasn't raised in the way we are raising it now during the course of the evidence
34 and in the sense that we didn't put in a submission for judicial notice during the course of the evidence.
35 We did, however, as Your Honours will see from the record, put in a motion for judicial notice at a later
36 stage. And we say that the fact that we put -- because that motion was effectively rejected, mainly
37 because the Trial Chamber said it was late.

1 But, in my submission, if one is asking the Chamber to take judicial notice of something, as long as
2 there is a reasonable time before the judgement, it is not too late. I mean, there may be a question of
3 criticism of me for not dealing with it diligently. But there is no rule setting a time limit and it is not too
4 late because there is no prejudice. Because if it is a question of judicial notice, the Prosecution can
5 react. The motion -- the Prosecution can react on the basis of the rules on judicial notice. So the issue
6 was raised formally, but I accept that it was raised at a late stage in the trial, which was the reason why
7 the motion itself was rejected by the Trial Chamber. But that aspect is dealt with in our pleadings.

8 MR. PRESIDENT:

9 Judge Meron.

10 JUDGE MERON:

11 Do I understand correctly that in the course of the trial, you did not specifically argue that not keeping
12 the record of the site visit prejudiced Mr. Bikindi?

13 MR. O'SHEA:

14 That's a difficult one for me to answer, Your Honour, because I remember that at the site visit itself, we
15 had a meeting, the Judges and the parties and those who were coordinating. And I am in a difficult
16 position to categorically state to you what was discussed at that meeting. I don't know if the record was
17 taken of that particular meeting, but I believe that during that meeting the issue of how we were going to
18 proceed procedurally was discussed. And I can't -- you know, I have to be honest with the Chamber, I
19 just simply don't remember whether I personally insisted that a written record was kept of distances. I
20 just don't remember. I know that this Chamber is loath to hear arguments about resources and time
21 and so forth. But the position of -- the position of counsel during a trial is not an easy one, particularly
22 when there are about 17 allegations facing the Accused. And there are so many little aspects to
23 consider as to what might come up during the course of an appeal. And it is difficult to deal with the
24 hypothetical as well as the concrete. And at that stage this was hypothetical.

25

26 And later I did receive a CD or a DVD. I did not ask whether it was specifically coming from the
27 Chamber, and I did watch it. But to be honest with you, I only watched it once the evidence in the
28 Bikindi case was closed because I was extremely busy.

29 JUDGE MERON:

30 Thank you.

31 MR. O'SHEA:

32 This is the reason why counsel should not prepare too well, because I was hoping to be about
33 two minutes on this point.

34

35 With regard to 1993 Kivumu, I am going to make a very simple point. During the course of the evidence
36 of Mr. Bikindi, Mr. Bikindi referred to the fact that he was in Germany in 1993 during the course of the
37 month of June. However -- and I checked the tapes, so it is not the translator's fault, although it's the

1 stenographer's fault. Bikindi did, in fact, say 1983 in French.

2
3 And, Interpreters, I am just going to move into French very quickly. He said 1983. In the decision that
4 this Appeals Chamber has recently issued that it was said that this could have been noticed in the
5 transcripts later.

6
7 Now, if I am going to have such a high burden with regard to the details in the transcripts, I will refer
8 that burden and I place that burden on the Trial Chamber as well. It was blatantly obvious that Bikindi
9 was not saying 1983, but 1993. It was blatantly obvious because my examination of Mr. Bikindi was
10 chronological, and I had previously spoken about issues in 1992. It was also blatantly obvious
11 because, as you will see in the judgement itself, the Trial Chamber Judges recognised that the
12 *Irindira* ballet was only created in 1987, and the issue was a discussion of the tour of the ballet. So I
13 flag that up for Your Honours because I know we've dealt with that in our written pleadings, and I know
14 Your Honours are going to think about -- you know, to what extent that was actually on the record, if
15 Mr. Bikindi misquoted himself.

16
17 And I ask Your Honours to be fair when looking at that situation. It was a matter which was not taken
18 into account by the Trial Chamber. The fact that it is not mentioned does necessarily always amount to
19 a flaw, as I have accepted, but in this particular instance it has to because they fully discussed the
20 Prosecution evidence. They must refer to the relevant Defence evidence in the judgement, in my
21 submission.

22
23 And Your Honours noted in Your Honours' decision that the learned Judges rejected the month of June
24 because they stated the month of May. But in my submission, the Trial Chamber did not reject the
25 month of June. They simply misconstrued the evidence. And it is not, in any event, in my submission,
26 for the Trial Chamber Judges to choose whether there is a contradiction between two months, to
27 choose the one that's most convenient, particularly where the June is the one that the witness firms
28 up on.

29 *(Pages 1 to 19 by Sithembiso Moyo)*

1 1020H

2 MR. O'SHEA (*continuing*):

3 So, I leave that there. I reluctantly and carefully, very carefully suggest to Your Honours that
4 Your Honours may wish to look at one aspect of Your Honours' decision, the -- where
5 Your Honours -- Your Honours reject the admission of additional evidence on Germany.

6 MR. PRESIDENT:

7 Don't do the Trial Chamber a disservice by saying that they have chosen the date, the month most
8 convenient, as distinct from what I think would be more proper, they have chosen the one that, in their
9 view, is supported by the evidence.

10 MR. O'SHEA:

11 Your Honour is quite right. And I'm sorry, I -- I'm wrong in the way I expressed that. In fact, the way
12 Your Honour expressed it is absolutely correct. The Trial Chamber took the view that that was the
13 appropriate month, according to the evidence.

14

15 My submission on that is that the Trial Chamber was not entitled to come to that view on that evidence.

16 MR. PRESIDENT:

17 I'm grateful for the clarification.

18 MR. O'SHEA:

19 Yes. Thank you. And as I say, and I see, Mr. President, your signature at the end of the document, so
20 I say this with great care. But the Appeals Chamber does, of course, have a power to review its own
21 previous decisions. I don't request that you review your entire decision on additional evidence. I do
22 request that you review that particular aspect in the light of what I've just said, because the additional
23 evidence that we found on Germany is not just persuasive, it's highly convincing as to Bikindi's
24 presence in Germany during the month of June. And if I'm right in the submission I've just made, it
25 does -- in my submission forward, in the category of miscarriage of justice. But I say that with great
26 care because I know Your Honours have already considered this issue, but now I bring new elements
27 before you.

28

29 I have to now move speedily. With regard to ineffective assistance of counsel, first of all -- We will,
30 hand them up and I'll deal with other issues.

31

32 First of all, I wish to add something about the test to be applied. But before I come to that, let me deal
33 with an essential thread which is not, I think, clearly expressed in our written pleadings, but I think is
34 useful.

35

36 In my submission, if Your Honours look at -- and I give Your Honours the reference -- but of course this
37 will be recorded in the transcripts for those not writing it down -- but at page 16, lines 31 to 37 of the

1 evidence of AKJ, during the course of the cross-examination by Mr. Momo, Your Honours will see that
2 counsel claims that it is a part of his strategy to go backwards and forwards. The President of the
3 Trial Chamber says, "But you're confusing everybody," or something to that effect, or "You're confusing
4 the witness," or something to that effect. And counsel comes back and says, "Well, you know,
5 essentially," I'm paraphrasing, but, "essentially, the secret is out now. I'm basically jumping backwards
6 and forwards, and that's our strategy."

7
8 What I have to say about that is that that is a very significant part of the cross-examination in my
9 submission, and this is why: Because in saying that, first of all, Counsel has demonstrated that he does
10 not understand the nature and purpose of cross-examination. If Counsel is deliberately trying to
11 confuse the witness as a form of strategy, he does not understand the nature and purpose of
12 cross-examination.

13
14 Secondly, he does not understand his ethical obligations. It is not the duty of counsel to try and trap the
15 witness. It is not the duty of counsel to try and confuse a witness. It is the duty of counsel, through
16 cross-examination, to test the evidence of a witness. It is unethical to deliberately try to confuse a
17 witness because you can end up getting evidence on the wrong basis.

18
19 And why is that particular part of the cross-examination being highlighted here today? I'm highlighting it
20 because the Trial Chamber itself states that -- it blames counsel for the confusion on dates in the
21 witness's testimony. Entirely, we say -- and you can read our submissions on this in our written
22 pleadings -- we say that that was wrong to blame counsel entirely because the Presiding Judge puts a
23 direct question to a witness in very clear terms and gets a very direct answer back. But we've
24 explained that, as I say, in our written pleadings.

25
26 But the fact of the matter is the impact of that so-called strategy on the part of counsel was that instead
27 of highlighting contradictions which we say are there, or drawing out other contradictions in an ethical
28 and proper way, counsel led to a situation where the Trial Chamber was in a position to say, "well, if
29 there was confusion on the dates, that's counsel's fault, that's not the witness's fault." The question is:
30 Does that make it Bikindi's fault? And the other question is: Even if it is Bikindi's fault, should he be
31 convicted because of it?

32
33 So in my submission, that creates the line, as I say, between incompetence, the impact on the trial, and
34 the miscarriage of justice in this particular case.

35 MR. PRESIDENT:

36 I can't see that I am persuaded that you have demonstrated how counsel's ineffective
37 cross-examination, as you call it, impacts on the verdict. I mean, this is not a disciplinary hearing. And

1 perhaps you might wish to try again to demonstrate, for my own satisfaction, how counsel's conduct of
2 the cross-examination prejudiced the client and why you would want us to look again at the judgement
3 of the Trial Chamber in that respect. Bearing in mind, of course, that this is not a disciplinary hearing.

4 MR. O'SHEA:

5 Yes, of course, Your Honour. Your Honour is quite right to make that distinction, of course. I have
6 handed up some binders -- did you give the Prosecution?

7
8 I handed up some binders and in the first -- the first document in the binder that I've handed up to
9 Your Honours is *Archbold* for 2009. Your Honours will know that this is a practitioner's guide in
10 England and Wales on matters of law. So, of course, it's not binding on this Chamber, but it can
11 be -- the principles outlined can be of persuasive authority.

12
13 If Your Honours look at page 1124, the last paragraph, it states as follows: "This approach was,
14 however, firmly rejected in *R v. Day*, where it was said that the test is the single test of safety and the
15 court does not have to concern itself with any such intermediate questions; but in order to establish lack
16 of safety in an incompetence case, the appellant has to show that the incompetence led to identifiable
17 errors or irregularities in the trial, which themselves rendered the process unfair or unsafe."

18
19 Now, I cite that as persuasive authority because of Your Honours's question. This is not a disciplinary
20 hearing. We're not concerned with the exact level of ability of counsel or the exact level of ability of
21 competence. What we are concerned with is whether this Accused has been done a bad deal. And I
22 say that this Accused has been done a bad deal. The proof of the pudding is the statement by the
23 Trial Chamber judges that, yes, there was confusion around the dates, but, no, we cannot attribute that
24 to the witness.

25
26 That is the proof of the pudding. It's not the whole story. The whole story is that the evidence of AKJ
27 was not effectively challenged.

28
29 Now, there must be, I submit, a minimum level of competence demonstrated by counsel during the
30 course of a cross-examination with regard to the testing of the evidence. We, as the parties, must be
31 able to rely on the Judges, both the Trial Chamber Judges and the Appeals Chamber Judges, to
32 exercise their extensive experience to know when a standard of cross-examination has fallen below
33 that minimum level. An Accused has the right to have his witnesses examined under the same
34 conditions as the Prosecution.

35
36 All cross-examinations are presumed to be competent. But if on the face of the transcripts, which is the
37 evidence of this cross-examination, Your Honours see our point, that this did not reach the minimum

1 standard, then Bikindi did not have his rights effectively protected during this trial.

2
3 There was an option. The Trial Chamber recognised that there was a problem. They intervened on
4 several occasions. But was it enough? Is it enough to intervene, but to let the cross-examination finish
5 and then deal with at the end of the day? In our submission not. If a Judge recognises that a
6 cross-examination does not reach the minimum standard, then we say the Judges must intervene.

7
8 What should they do?

9 MR. PRESIDENT:

10 There are two other passages that I -- I think are also opposite. The same paragraph to which you
11 referred us, the reference to *Teeluck v. State of Trinidad and Tobago*, and *John v. same* --

12 MR. O'SHEA:

13 Yes.

14 MR. PRESIDENT:

15 -- where it was held that the focus of the appellate court ought to be on the impact which counsel's
16 errors had had on the trial and the verdict --

17 MR. O'SHEA:

18 Yes, yes.

19 MR. PRESIDENT:

20 -- rather than on attempting to rate his conduct according to some scale of ineptitude. Which goes to
21 the point that I made. The real question for us is the impact that his alleged errors had on the trial and
22 the verdict.

23 MR. O'SHEA:

24 Yes. Thank you, Mr. President, because I led into that issue and then, in a way, led away from it. So
25 we have one minimum standard on the one side. So what I'm saying is don't go into the details -- you
26 don't have to go into the details. Once you see that there is a problem, you then look, as Your Honour
27 quite rightly says, at the impact.

28
29 What is the issue in this appeal? The issue in this appeal is that we say that the month of June 1994
30 was not properly established on the evidence for the various reasons we've outlined in our grounds. So
31 the date of the offence was crucial to this case, and it was crucial to the conviction. If Your Honours go
32 through our written pleadings, we have highlighted how there were, in fact, contradictions with regard to
33 the date in the evidence of AKJ, and also in the evidence of AKK. So the date was absolutely
34 fundamental to this exercise.

35
36 If counsel cross-examines in a way which completely confuses everybody in the court -- and the
37 evidence of that is in the judgement and on the transcript, even Prosecution counsel said it -- if the

1 effect of cross-examination is to thoroughly confuse everybody and the result of that confusion is that
2 on the record there are contradictions, but that those contradictions are ultimately explained away on
3 the basis that they're the fault of counsel, and if that results from counsel's incompetence, then in such
4 circumstances there is your impact and there is your miscarriage of justice.

5
6 Because had the witness been cross-examined to a sufficient level, and had there not been an
7 improper method of cross-examination employed, then we would have found ourselves in a position
8 where either there were no contradictions and the witness can hold his flag up high, or there are
9 contradictions which would be evaluated within the testimony of the witness and not on the basis of the
10 questions of counsel.

11
12 Does that answer Your Honour's question?

13 MR. PRESIDENT:

14 Yes. I'm told you have ten minutes left.

15 MR. O'SHEA:

16 Thank you. That's more than I was expecting, actually.

17 MR. PRESIDENT:

18 You're not obliged to use it.

19 MR. O'SHEA:

20 I have a client next to me, Your Honour. No, I'm joking, I wouldn't use it if I didn't have to.

21
22 Okay. I will use this time to address two issues.

23
24 First of all, there is the issue of the video of the 11 -- sorry, of the 7th of November 1993. The -- at
25 various points in the judgement -- and this is discussed in our pleadings -- the Trial Chamber makes
26 reference to a meeting at which it was said that Bikindi was speaking. There's very little in this case to
27 support the Prosecution's contention of the political side of Mr. Bikindi. We've got the Kivumu meeting
28 of 1993. We have this meeting, allegedly, on a CD, on a video. But I can't put it lower than this: In the
29 17 years I've been at the bar, I have not seen such an extraordinary manipulation of evidence. That
30 DVD is Prosecution Exhibit P. 30. Your Honours will have the opportunity, during the course of this
31 hearing, to look at Mr. Bikindi.

32
33 If you go through the transcripts of BGH, you will see that Mr. Morley for the Prosecution introduces
34 Exhibit P. 30. He tries at various points to persuade the Trial Chamber Judges that there's no point in
35 looking at the video and they should only look at the written transcript of the video on the basis that
36 there are not adequate facilities in the court.

1 Ultimately, the Trial Chamber forces it about and the video is watched. And you will see the point in the
2 transcript of Witness BGH where Mr. Morley states that "You would have" -- "You would have" -- this is
3 the point, this is the point where it is said that Bikindi is speaking. That's all you have in the -- in the
4 transcripts on this video. If you look at minute 30 on the computer -- not on the clock on the video, on
5 the image, but on the computer, which is what counsel is referring to -- you will see that at that point,
6 rather than speaking, there is singing and dancing. Not the Irindiro ballet, another ballet.

7
8 So there's no speaking. There's singing and dancing. And there's no image of Mr. Bikindi. And I find
9 it extraordinary how this ended up in the judgement and was relied upon. How the Prosecution, even in
10 the appeal, continued to rely on it. Counsel, in the trial, Prosecution counsel, said he'd seen the video.
11 But Bikindi is not there. This is a matter which this Appeals Chamber must look at carefully. Even
12 if -- even if Your Honours are of the view that it is a collateral issue because it relates to Bikindi's
13 position within the MRND, it has an influence on the findings, the general findings, but it also has an
14 influence on the sentence. Because it was one of the central pillars why it was said that he was an
15 influential member of the MRND.

16
17 It is absolutely grotesque that an Accused finds himself convicted on evidence which includes a video
18 which does not contain his image.

19
20 Lastly, on the question of sentencing --

21 MR. PRESIDENT:

22 Can you just tell me again, you described something as manipulation of the evidence.

23 MR. O'SHEA:

24 Yes.

25 MR. PRESIDENT:

26 Very strong language.

27 MR. O'SHEA:

28 I know. And I think it is --

29 MR. PRESIDENT:

30 That's warranted?

31 MR. O'SHEA:

32 I think it is. I have to be careful, the language I use, I know that. It's not manipulation of evidence on
33 the part of the Trial Chamber Judges, because I don't know why the Trial Chamber Judges relied on it,
34 but it is --

35 MR. PRESIDENT:

36 You say it is manipulation on the part of --

37

1 MR. O'SHEA:

2 The Prosecution.

3 MR. PRESIDENT:

4 Prosecution?

5 MR. O'SHEA:

6 Yes, it is. Why do I say that? I say that because when you look at the transcript, the
7 Kinyarwanda transcript, it says "Bikindi", question mark. When you look at the video, Bikindi is not
8 there. Counsel has categorically stated to the Court that he has seen the video. He categorically
9 states to the Court, "In another jurisdiction" -- something to this effect -- "In another jurisdiction I would
10 show this video of Bikindi speaking." If Bikindi is not there speaking on the video, how can any counsel
11 say, "I would show the video of Bikindi speaking"?

12 MR. PRESIDENT:

13 Yes, Judge Meron.

14 JUDGE MERON:

15 Mr. President. This is of course an important point. But the video was shown at trial.

16 MR. O'SHEA:

17 Yes

18 JUDGE MERON:

19 Did the counsel for Mr. Bikindi make the points that you are making now, very vigorously, to the fact
20 that Mr. Bikindi does not appear in the video?

21 MR. O'SHEA:

22 Absolutely not, Your Honours. Absolutely not.

23 JUDGE MERON:

24 And this is a point that you're addressing in the context of the competence of the counsel?

25 MR. O'SHEA:

26 Well, if there's need for collateral examples outside the cross-examination -- because here we're
27 dealing with the cross-examination of AKJ when we're talking about incompetence of counsel.

28 So this is not part of our case there, no, but if one needs an example of incompetence outside the
29 cross-examination, that is certainly one. Why? Counsel didn't stand up and say, "I don't understand
30 this." I don't know. Counsel did stand up and say, "Why is there a question mark next to Bikindi in the
31 Kinyarwanda transcript," yes.

32

33 But when Mr. Morley said: "Look at this part, where this chaos is," he uses the word "chaos", because
34 the quality of the video is bad. Where this chaos is is where it is said Bikindi is speaking. That's all we
35 have in relation to this video. And that's why I use the word "manipulation". I can't imagine how
36 counsel can say he's seen the video, talk about Bikindi speaking on the video, having said he's seen
37 the video, and then show the relevant part and then say, "This is where it is said Bikindi is speaking."

1 If -- if none of that had been done we wouldn't have even be talking about this today, and we shouldn't
2 be.

3 JUDGE MERON:

4 *(Inaudible)* ... in advance of the proceedings it was the clear duty of the counsel to raise this point?
5 And you are presenting counsel with quite a difficult situation.

6 MR. O'SHEA:

7 I accept that. I accept that. It is a difficult situation, but this is the story of Mr. Bikindi. When -- one of
8 the issues which has been raised is did we -- did we raise the issue of ineffective assistance of counsel
9 during the trial? In our closing brief we did raise the question of the cross-examination of AKJ. If you
10 look at our closing brief and you look at the discussion of AKJ, you'll see we talk about that. It's very
11 difficult for me, of course, because Mr. Momo was next to me. But I did refer to it.

12
13 And -- and you will notice that we also referred to this in the context of the cross-examination of BUY
14 because we had an extraordinary situation where lead counsel, co-counsel, and the Accused all
15 cross-examining the expert. And the Defence team ends up having a ridiculously short amount of time
16 to prepare the examination of BUY. So there are, you know, examples scattered through these
17 proceedings of the 17 odd allegations against Bikindi where his counsel did not do what they ought to
18 have done at particular moments in time.

19
20 And, yes, I can understand that from a legal point of view that question arises for the Appeals Chamber.
21 Does the fact that Mr. Nderitu did not make the point I'm making today drop the point? In my
22 submission it does not. Because the relationship between Bikindi and the MRND formed part of the
23 basis of persuading these Judges. It formed part of the basis of saying he was perceived as an
24 influential member of the MRND.

25 MR. PRESIDENT:

26 Judge Meron has a question for you.

27 MR. O'SHEA:

28 Yes.

29 MR. PRESIDENT:

30 Judge -- Sorry. Judge Pocar.

31 JUDGE POCAR:

32 Thank you. Counsel, perhaps you may try to help me understanding exactly which is your point. I go
33 away from the responsibility or the competence of the counsel and going to how the Trial Chamber
34 relied on the video. May I direct you to footnote 1112 in the judgement concerning paragraph 64 of the
35 judgement.

36

37 Is that your point, that a transcript of the meeting was entered into evidence, as well as the video of the

1 meeting, and there is discrepancy between the two?

2 MR. O'SHEA:

3 Yes. In the written transcript, the word "Bikindi" appears. In the Kinyarwanda version, with a
4 question mark; in the translations, without a question mark. So there is a discrepancy in that the
5 transcript asserts the presence of Bikindi. The video does not show Bikindi. But that's the extent of the
6 discrepancy.

7
8 The transcript is a verbatim transcription of what was said. And where it says "Bikindi", question mark,
9 it gives the impression that a speech is being made. But, in fact, when you go to that part of the video
10 you hear singing and dancing. You do not see Mr. Bikindi. So our complaint is that Bikindi is just not
11 there.

12
13 Let me put it in a legal way, because I have to help Your Honours here. In my submission, if there is an
14 exhibit -- first of all, of a video -- first of all, that has to properly go into evidence if it's attempting to
15 identify the Accused. Has to properly go into evidence, in my submission, through a witness. BGH
16 wasn't in a position to enter this into evidence because she didn't know about this particular meeting
17 and this particular so-called speech of Bikindi, although she knew that Bikindi had appeared at -- had
18 appeared at various meetings in the Nyamirambo Stadium. But she didn't know about this particular
19 meeting.

20
21 In those circumstances it couldn't go through her. But it was done during her evidence. If, in fact,
22 Counsel identified Bikindi, but Counsel didn't identify Bikindi. All he did was he said, "That bit where the
23 chaos is, that's where it is said Bikindi is speaking." That's as far as it goes.

24 JUDGE POCAR:

25 I try to understand your point. The Trial Chamber, in that paragraph, said -- relying, I presume on the
26 transcript -- says, "Following the speech by President Habyarimana, Bikindi made a short speech." So I
27 presume the transcript shows a speech that you say, with a question mark, is attributed to Bikindi; is
28 that correct then?

29 MR. O'SHEA:

30 It shows words which are described as a speech, but which are, in fact, as far as I can see, singing.

31 JUDGE POCAR:

32 So what your point is, that when the Trial Chamber says, "Bikindi made a short speech," this is wrong?

33 MR. O'SHEA:

34 That --

35 JUDGE POCAR:

36 Where the Trial Chamber --

37

1 MR. O'SHEA:

2 That is a wrong statement.

3 JUDGE POCAR:

4 And that would be wrong both on the face of the video and the face of the transcript?

5 MR. O'SHEA:

6 No, on the face of the transcript it will be correct, sort of, because the transcript says "Bikindi",
7 question mark, in the original version. But it's the video which is the exhibit. The transcript is just there
8 to provide an indication of what was said during the course of the meeting in the video.

9 JUDGE POCAR:

10 I thank you.

11 MR. O'SHEA:

12 Yes. But I would invite Your Honours to look at that video. It's an exhibit in the case. Have a look at it.
13 But in my submission, the position is that if -- for a video to be entered to identify an Accused and to be
14 used to convict an Accused, that must be -- it must be identified by a witness. If it's identified -- if it's not
15 identified in the Court and later the Judges see, "Oh, hang on a minute, that's Bikindi," all right, then it
16 must be clear on the face of the video. And, really, the Judges ought to call the parties back, I think.
17 But even if they don't call the parties back, Bikindi has got to actually be there. If there -- you know, if
18 it's a doubtful situation, they certainly have to call the parties back. That's from a procedural point of
19 view.

20 MR. PRESIDENT:

21 Thank you very much. You're five minutes beyond, but for good reason. That must be the end of your
22 submissions, Mr. O'Shea.

23 MR. O'SHEA:

24 Yes. With Your Honours' leave, I can address sentencing in the reply.

25 MR. PRESIDENT:

26 Yes.

27 MR. O'SHEA:

28 Thank you.

29 MR. PRESIDENT:

30 Yes, yes. We'll take a break now, 20 minutes.

31 *(Court recessed from 1049H to 1116H)*

32 MR. PRESIDENT:

33 Who will be starting for the Prosecution?

34 MR. NSANZUWERA:

35 It will be me, Mr. President.

36 MR. PRESIDENT:

37 May I have your name? Because I addressed Mr. O'Shea by name, and I would like to do the same.

1 MR. NSANZUWERA:

2 Yes. Thank you. My name is François Nsanzuwera. François Nsanzuwera.

3 MR. PRESIDENT:

4 I didn't get the last name. Can you give me your last name again, please?

5 MR. NSANZUWERA:

6 Nsanzuwera. N-S-A-N-Z-U-W-E-R-A.

7 MR. PRESIDENT:

8 Nsanzuwera.

9 MR. NSANZUWERA:

10 Nsanzuwera, yes, Mr. President.

11 MR. PRESIDENT:

12 Nsanzuwera. Before you begin, Mr. Nsanzuwera, there are two matters that I want to address. During
13 the arguments for the Appellant, a motion for reconsideration of the Appeals Chambers decision on
14 Rule 115 was made. I would like to have brief submissions from both parties on this motion,
15 five minutes each, at the beginning of this afternoon's session. That's at 3 p.m.

16

17 The second matter relates to the motion filed by Mr. Jean de Dieu Momo. It's a motion seeking that he
18 be made an *amicus curiae* in these proceedings, and I would want to have brief submissions, five
19 minutes from both parties at this afternoon's session at 3 o'clock. So is that clear? Mr. O'Shea, did you
20 understand that?

21 MR. O'SHEA:

22 Yes, yes I did, Your Honour, and I --

23 MR. PRESIDENT:

24 We will address two matters briefly this afternoon.

25

26 So, Mr. Nsanzuwera -- Nsanzuwera, you may begin.

27 MR. NSANZUWERA:

28 Good morning, Mr. President. Good morning, Your Honours. As I have just told the President, my
29 name is François Nsanzuwera. I'm going to deal to the submissions of Mr. Bikindi.

30 MR. PRESIDENT:

31 I'm sorry about that. Please start again.

32 MR. NSANZUWERA:

33 I should, rather, apologise, Mr. President. I was saying that I'm going to respond to Mr. Bikindi's
34 submissions relating to his conviction on direct and public incitement to commit genocide. And my
35 colleague sitting to my right will deal with the submissions relating to the conviction -- to the sentence.

36

37 As you did request at the beginning of this session, we are not going to go over our entire written brief.

1 We respectfully refer your Chamber to our brief which was filed on 27 of April 2009. Concisely, and
2 before I go into the details of some of the submissions made today in the course of this session, our
3 position is as follows: None of the grounds of appeal advanced by Mr. Bikindi, represented by our
4 learned friend, does not constitute an error of law or fact that may reverse the decision of the
5 judgement.

6
7 The Accused was convicted of direct and public incitement to commit genocide on the road to -- the
8 road between Kivumu and Kayove. And he presented to Your Honours six grounds of appeal.
9 However, if one closely examines the six grounds of appeal, four of these grounds relate to the
10 credibility of Prosecution witnesses, more specifically, Witnesses AKK and AKJ. The other grounds
11 referred to *Opération turquoise* and ineffective assistance of counsel, Jean de Dieu Momo. Otherwise,
12 the other grounds of appeal relate to the credibility of Prosecution witnesses.

13
14 We are, therefore, going to deal cumulatively with the grounds that relate to the credibility of
15 Prosecution witnesses, and then conclude with failure to take judicial notice of *Opération turquoise*, and
16 the ineffective assistance of Counsel, Jean de Dieu Momo. We, therefore, are now going to follow the
17 order in which Mr. Bikindi presented his grounds of appeal.

18
19 He says, "Ground of appeal: Appellant challenges the Trial Chamber that in June, on the road between
20 Kivumu and Kayove, Bikindi, in a convoy with *Interahamwe*, referred to those -- referred to the majority
21 Hutu to seek out the Tutsi, and not to spare them. Mr. Bikindi alleged that the Trial Chamber, in
22 accepting the testimonies of Witnesses AKJ and AKK, in spite of the inconsistencies that were inherent,
23 the Chamber committed an error.

24
25 Indeed, the submission of Mr. Bikindi is as follows: That since the Trial Chamber -- since the
26 Trial Chamber determined that there was a reasonable doubt regarding the month of the death of the
27 priest, Gatore, the Trial Chamber ought not to have concluded that Bikindi, in -- Bikindi was on that road
28 in June 1994. He also stated that the Trial Chamber mischaracterised the testimony of Witness AKJ
29 with regard to the dates of 1993, 1994. This was referred to this morning. He even goes further, to say
30 that since these two witnesses were not credible, they could not have corroborated each other.

31
32 Your Honours, our response is as follows: The fact that Father Thaddée Gatore and one Kabayiza
33 were killed in April 1994, and not in June 1994, does not in any way detract from the credibility of
34 Witness AKK. This Witness AKK never stated that he witnessed the death of Father Gatore. He stated
35 that he heard other persons -- during the cross-examination of Witness AKK by lead counsel for
36 Mr. Bikindi, Witness AKK stated that he was not present and that it was those who killed
37 Father Thaddée Gatore who were boasting. That is on page 11 of transcript of 22 September 2006.

1 That is in its French version.

2
3 The Presiding Judge of the Trial Chamber herself raised the same question, and the witness
4 responded that he never witnessed the death of Father Thaddée Gatore. This is the transcript of
5 22 September 2006, on page 17, lines 27 to 31 of the French version. However, Your Honours,
6 Witness AKK did see, with his own eyes and heard with his own ears, Bikindi on the road -- on the
7 Kivumu-Kayove road in the month of June 1994.

8
9 The fact -- and the Defence does not challenge this -- that the Trial Chamber did not admit a part of the
10 testimony of Witness AKK and did not (*sic*) admit another part, it's not an error on the part of the
11 Trial Chamber. It is not reasonable for a trier of fact -- it is reasonable for a trier of fact to accept a part of a
12 testimony and not accept other parts. This is in the appeal -- the judgement of *Muvunyi*, paragraph 128
13 and *Gacumbitsi* judgement, paragraph 42.

14
15 Regarding the Witness AKJ, contrary to the assertion of our learned friend, Witness AKJ did not -- did
16 not confuse the years 1993 and 1994. Witness AKJ recounted, in the course of his testimony,
17 two different events in which Bikindi participated at two different periods. At -- there was a rally of the
18 MRND party which took place on the Kivumu football field in 1993. The Appellant referred extensively
19 to this in the morning. If you go to the finding of the Trial Chamber, that is, paragraph 141 of the
20 judgement, the Trial Chamber, regarding the event of Kivumu, noted the year 1993. There is no month.
21 The Chamber noted that the Kivumu event took place in 1993. And then it is not only Witness AKJ who
22 makes reference to this rally of 1993. Witness AKK also referred to this meeting of 1993 at Kivumu.

23
24 The second event that Witness AKJ testified was on the bus convoy on the Kivumu-Kayove road. And
25 as the Trial Chamber stated, the testimonies of AKK and AKJ on this event of June 1994 on the
26 Kivumu-Kayove road, the two witnesses corroborate each other on important facts. Witness AKK and
27 Witness AKJ saw Mr. Bikindi aboard a vehicle which was part of a convoy in June 1994. Witness AKK
28 saw the convoy while he was on his way to Kayove, whereas, Witness AKJ saw the convoy when he
29 was coming back from Kayove. And the two witnesses stated that songs of Bikindi were played and
30 that he referred to Tutsis as snakes.

31
32 On this issue, I would like to respond to the question that was raised this morning when defence for
33 Mr. Bikindi stated that if -- that minus the testimonies of the two witnesses, the offence of direct and
34 public incitement to commit genocide will not stand. To start with, Prosecution submits that the issue is
35 hypothetical. In fact, the Defence itself made this point. Because Witnesses AKJ and AKK were
36 considered as credible by the Trial Chamber, where is the difference between the testimonies? When
37 the convoy was going to Kayove, did Bikindi ask that the Tutsi be fished out and that no one be spared?

1 And used the term "the majority of the people" in reference to the Hutus. And on his way back, he
2 asked if the Tutsis had been killed.

3
4 And the Bikindi -- Defence for Bikindi is saying that these words of AKJ does not constitute direct and
5 public incitement to commit genocide. I must say that I'm extremely surprised because the judgment, in
6 its paragraph 4 -- 423, the Trial Chamber stated that "Bikindi's speech should be placed within the
7 prevailing context, the context of killings of Tutsis, massacres of Tutsis, and also the fact that Bikindi
8 could not be unaware of the prevailing situation."

9
10 So even in a hypothetical situation where we may admit that the testimony of AKJ -- even then the
11 offence of direct and public incitement to commit genocide had been proven beyond a reasonable
12 doubt. In this regard we refer to our -- our brief, paragraphs 20 to 24. And that takes me to the
13 fourth ground of appeal.

14
15 In the fourth ground of appeal Mr. Bikindi states that the Trial Chamber erred in the evaluation of the
16 Defence evidence and that his own testimony was not taken into account by the Trial Chamber.
17 Indeed, Mr. Bikindi relies on paragraph 279 of the judgement. We submit, we assert that in actual fact,
18 the Appellant made a wrong reading of this paragraph 279.

19
20 In this paragraph, the Trial Chamber noted that each one of the Defence witnesses had close
21 relationships with Mr. Bikindi. This is what the Chamber stated. But it went further to state that that
22 does not invalidate the testimonies of those witnesses. And the Chamber states that none of the
23 Defence witnesses was in a position to give an account of each movement of Mr. Bikindi during that
24 period that he lived in the house of his friend, Mr. Marc. Indeed, Witness DVR went at work at Nyundo
25 maternity every day. Witness Apolline Uwimana said that Bikindi used to go out alone. In fact, this
26 morning, the Defence for Bikindi stated that from time to time Bikindi went to take care of the ballet.

27
28 Witness QUTI admitted that he did not accompany Bikindi each time he went out. Witness KMS did not
29 live in Marc's house and did not see Bikindi every day. The two other Defence witnesses who testified,
30 saying that Bikindi was -- did not go out were witnesses TIER and CQK, and these two witnesses did
31 not live in Marc's house. All these are stated in paragraph -- paragraph 279 of the judgement.

32
33 Allow me, Your Honours, to recount that it is -- it falls to the Trial Chamber to weigh and assess the
34 evidence. It falls to the trial chamber to determine whether a witness is credible. And, further,
35 Trial Chambers are not bound to explain each one of their findings and conclusions that they arrive at.
36 This -- we refer to the appeals judgment of *Musema*, paragraph 20, and *Rutaganda* appeal judgment,
37 paragraph 536. We submit that the Trial Chamber did take into account the testimony of these

1 witnesses, and the Appellant has not demonstrated any error in the approach of the Chamber.

2
3 In his brief he also made reference to the ethnic group of some Defence witnesses. He referred to their
4 ethnic groups and he let me recall that the Prosecutor is of the view that this does not entail any error
5 on the part of the Trial Chamber. That a Defence witness who is a Tutsi -- that Defence witness is a
6 Tutsi did not raise any doubt about Prosecution evidence, does not entail any error.

7
8 There was an issue, Your Honours, that was dealt with this morning by our learned friend, that is, the
9 issue of the distance between between Kivumu and Kayove. And we believe that we need to shed
10 more light on this issue, more than it was done in our brief.

11
12 The Defence for Mr. Bikindi told you this morning that the Kivumu-Kayove trip took between
13 four and five hours. I must admit that I'm very surprised because the issue of distance was not dealt
14 with in the course of the trial. And if my memory serves me right, while going through the transcripts, I
15 saw that it was during the cross-examination of Witness AKJ that the Defence of Mr. Bikindi puts to
16 Witness AKJ the question of the distance between Kivumu and Kayove. And the witness was
17 responding to Mr. Bikindi's question, said that the distance is 20 kilometres. And the Defence for
18 Bikindi followed up on this question by asking what time that the Nyamyumba-Kayove trip would have
19 taken in terms of time. And Witness AKJ responded by saying maybe five hours.

20
21 But this matter of time, the time that would be needed for the trip to be done between Kayove and
22 Kivumu was never discussed during the trial. And with all due respect to my learned friend, we believe
23 that this argument merely arises from speculation, it's tantamount to speculation.

24
25 Mr. President, Your Honours, we would like now to move on to the sixth ground of appeal as submitted
26 by Mr. Bikindi.

27
28 Mr. Bikindi alleges that the assessment of the evidence concerning his status within the MRND and his
29 relationship with the *Interahamwe*, in that relation the Trial Chamber committed an error. And he goes
30 even further by saying that the conclusions arrived at concerning his relations with the MRND and with
31 the *Interahamwe* was given weight in his sentencing for public and direct incitement to commit
32 genocide.

33
34 We are of the view that this allegation, Your Honours, is a very serious allegation. The Trial Chamber
35 concluded that the Appellant was perceived as an influential member of the MRND and that he was
36 familiar with important personalities of the MRND. Witnesses mentioned Édouard Karemera, who was
37 vice-chairman of the MRND. Mention was made of Mathieu Ndirumapatse, who was chairman of the

1 MRND; Habyarimana who was president of the -- or, chairman of the MRND in Kigali. And the
2 Trial Chamber based its conclusions on the testimony of BGH, as well as the congratulations which
3 were made in public by Karemera, Édouard, vice-chairman of the MRND at national level, as well as
4 the statements made by Mr. Bikindi himself at meetings or rallies of the MRND in Nyamirambo in 1993,
5 and in Kivumu, also in 1993.

6
7 Now, this morning I would like to underscore the fact that the Defence of Mr. Bikindi made allegations
8 which we are believing to be very serious. He spoke of the manipulation of the evidence in reference to
9 a video which was projected during the proceedings. Let me state before the Appeals Chamber that I
10 did not see this video. I was not a part of the trial team -- trial chamber team, but the video is allegedly
11 not showing Bikindi. And the findings of the Trial Chamber on the relationship between Bikindi and the
12 leaders of the MRND, that finding was drawn from several testimonies, not only the evidence on the
13 video.

14
15 Further, we are surprised that this matter was not raised during the deliberations -- during the trial
16 because the words used this morning is a serious allegation because we are talking about manipulation
17 of evidence by the OTP.

18
19 Several witnesses said at trial that Bikindi was not only an artist, a popular artist, but that he was also
20 close to the *Interahamwe* and that he was also respected by them.

21
22 Now, as for the sentencing of Bikindi for the incident of the end of June 1994, the Chamber arrived at
23 that conclusion on the basis of testimonies of AKK and AKJ. Bikindi did not demonstrate to you,
24 Your Honours, in what way his relationships with the political leaders of the MRND and his relationships
25 with the *Interahamwe*, how those conclusions were shown in the testimonies of AKK and AKJ.

26
27 We now wish to move on to the matter of *Opération turquoise*. This was raised this morning by the
28 Defence and this was the third ground of appeal of Mr. Bikindi. And as the Defence stated this
29 morning, it had presented to the Trial Chamber a motion for judicial notice of *Opération turquoise*. And
30 the Trial Chamber dismissed the said motion and the Defence explained that the judicial notice motion
31 was because the filing of that motion took place belatedly.

32
33 Your Honours, *Opération turquoise* took place in 1994 and the trial of the appellant began on the
34 18th of September 2006. The Defence concluded its case on the 7th of November 2007. During
35 61 days of hearing the Appellant never said that the *Opération turquoise* prohibited him from committing
36 the crime of direct and public incitement to commit genocide. He awaited until the 9th of April 2008 to
37 file his motion for judicial notice.

1 We believe that the Trial Chamber had the right to dismiss that motion due to the fact that the motion
2 was filed too late. If the Defence had been of the opinion that the matter was of issue, it should have
3 filed that motion in time, as required by the rules of procedure. And we also believe that Mr. Bikindi did
4 not suffer any prejudice from the fact that the Trial Chamber dismissed the motion for judicial notice of
5 *Opération turquoise*.

6
7 When we look at documents that have been filed by the Defence, documents of the United Nations, the
8 zone of the *Opération turquoise* is to be found in the *préfectures* of Kibuye, Cyangugu and Gikondo.
9 The *Opération turquoise* troops were not in the zone where the crime of direct and public incitement to
10 commit genocide was committed. Nothing in the documents tabled by our learned friends demonstrate
11 that Kivumu-Kayove road was blocked by troops of the *Opération turquoise*. And in those documents
12 there is no demonstration that these troops would have prohibited or prevented Bikindi from committing
13 the crime of direct and public incitement to commit genocide in 1994.

14
15 In reference to *Opération turquoise*, I also wish to respond to the question raised by our learned friends
16 this morning regarding the itinerary used by the Judges in site visits to Rwanda. I saw the video the
17 day before yesterday. I looked at the video. I even saw my learned friend. But he stated before the
18 Chamber this morning that he was part of that site visit, but nowhere in that video did I see in -- or, in
19 the discussions, any challenging of the distances of that same trip. I'm surprised to hear today that the
20 Defence of Mr. Bikindi is alleging that the Judges ought to have confirmed the itinerary. The matter of
21 the site visit is a matter of discretionary powers of the Trial Chamber and the jurisprudence of the
22 Appeals Chamber. And the *Galic* case, at paragraph 50, shows this.

23
24 Let me come back to the Trial Chamber. It decided that a site visit was necessary. That Trial Chamber
25 did go to the site. The Defence team for Mr. Bikindi was present. Indeed, the trip and the site visit was
26 registered -- or, recorded on the video that I saw a couple of days ago. Now, what would the itinerary
27 have done to change the conclusion arrived at by the Trial Chamber regarding the fact that Bikindi did
28 publicly and directly incite people to commit genocide on the road from Kayove to Kivumu -- Kivumu to
29 Kayove, I beg your pardon, in June 1994?

30
31 We wish to conclude our oral submissions on the ground of appeal concerning the alleged inefficiency
32 of assistance of Mr. Momo.

33 MR. PRESIDENT:

34 Sorry to interrupt. Judge Güney has a question.

35 JUDGE GÜNEY:

36 Thank you, Mr. President.

37

1 Counsel, I need clarification from you. The first of which concerns the date of the transcripts of the
2 video. Do the transcripts of the video bear a date, first of all? Are they dated?

3 MR. NSANZUWERA:

4 You're referring to the video concerning the Judges' site video?

5 JUDGE GÜNEY:

6 Yes.

7 MR. NSANZUWERA:

8 Yes, Your Honour. I looked at the video, as I said, the day before yesterday, the video which I obtained
9 from the Tribunal services responsible for the videos. There are dates, and the itinerary is also there.
10 Let me give -- in the example of the Judges, they left Kigali, they went to Gisenyi, and the Judges left
11 Gisenyi for Kayove, and all those dates are there.

12 JUDGE GÜNEY:

13 Another point, the Trial Chamber did not mention whether it believed that the transcripts were reflecting
14 the contents, the very contents of the video itself. Is that correct?

15 MR. NSANZUWERA:

16 Your Honour, if my memory serves me right, I didn't see, in the judgement, any matter of the video in
17 the judgement. I did not see any such thing.

18 JUDGE GÜNEY:

19 Thank you.

20 MR. NSANZUWERA:

21 We wish to conclude with the fifth ground of appeal concerning the inefficient assistance of
22 Mr. Jean de Dieu Momo. And this is, in fact, the fifth ground of appeal.

23
24 Counsel for Mr. Bikindi spoke this morning at length of the cross-examination of Witness AKJ by saying
25 that his learned friend committed certain mistakes that -- errors. He even said that a matter of
26 competence or incompetence was not at stake in the ground of appeal, but he did not show, either, the
27 prejudice that Mr. Bikindi may have suffered. I wish to recall that when Witness AKJ testified before the
28 Trial Chamber, that was on the 21st of September 2006, lead counsel, the Appellant, and co-counsel,
29 Jean de Dieu Momo, were all present at the hearing. None of them at the time challenged the
30 efficiency of co-counsel and the conduct of the cross-examination of Witness AKJ.

31
32 Throughout his trial Mr. Bikindi testified his confidence and trust in his co-counsel. However, he asked
33 the withdrawal of lead counsel, Mr. Nderitu, at the time, who was replaced by my learned friend present
34 before the Chamber today.

35
36 At the end of him testimony before the Trial Chamber -- I believe that was on the 6th of November in
37 the year 2007 -- Bikindi referred to Jean de Dieu Momo on these terms: "My thanks also go to

1 Mr. Momo, who supported me, and supported me a great deal, morally," and I underscore,
2 "professionally, supported me during these difficult times." And those were the words expressed by
3 Mr. Bikindi before the Trial Chamber on the 6th of November 2007.

4
5 Let me refer you to the transcripts of the hearing of the 6th of November 2007, at page 9, at
6 line 18 to 19 in the French version. So it was before the Trial Chamber that the Defence -- it was before
7 the Appeals Chamber that the Defence for Mr. Bikindi raises for the first time the inefficiency of
8 Mr. Jean du Dieu Momo, co-counsel, because one of the witnesses which he cross-examined,
9 Witness AKJ, is one of the two witnesses on which the Trial Chamber based its conclusions to find
10 Bikindi guilty of public and direct incitement to commit genocide. We are of the opinion that the
11 Defence did not demonstrate that the Chamber committed any error.

12
13 I now wish --

14 MR. PRESIDENT:

15 Sorry, Mr. Nsanzuwera. You made reference to the expression of gratitude by Mr. Bikindi for the
16 conduct of the trial and the help given to him by his Counsel. But you wouldn't be submitting, I hope,
17 that that would operate as a kind of bar to Mr. Bikindi raising in this appeal that he was not properly
18 represented at the trial. I mean, that expression of gratitude I would want to see as a protocolary
19 offering on the part of Mr. Bikindi.

20 *(Pages 20 to 38 by Janice Dickman)*

21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

1 1200H

2 MR. PRESIDENT (*continuing*):

3 Mr. Bikindi is himself not a lawyer, and was he being anything more than polite in that expression of
4 gratitude?

5 MR. NSANZUWERA:

6 Thank you, Mr. President. I do understand your intervention and your question. What is at stake here
7 is very important. Bikindi, as he himself said, by the way, was risking life imprisonment for crimes with
8 which he was charged. Bikindi would not have expressed his gratitude to counsel who he believed did
9 not sufficiently defend his case. During the trial, Bikindi asked the registry to remove or withdraw
10 lead counsel from his services. And the letter that Bikindi addressed to the Registrar, in that letter he
11 said that he no longer had any confidence in his lead counsel but that he had trust and confidence in
12 his co-counsel, who was at the time Mr. Jean de Dieu Momo.

13
14 When lead counsel was appointed to replace the initial lead counsel, he worked together with
15 co-counsel. This morning he said to the Chamber that he could not speak about the incompetence of
16 his learned friend in front of the Chamber. These were -- he was dealing with the interests of his client
17 who was charged with very serious crimes.

18
19 So I believe that this gratitude expressed by Mr. Bikindi was not uncalled for. And I would also go
20 further to say that Mr. Jean de Dieu Momo was presumed competent. He was present and he
21 repeated -- and it has been repeated before this Appeals Chamber that he is not questioning the
22 competence of his lead counsel. He didn't say that Jean de Dieu Momo committed any serious
23 professional error, but it was only today after the judgement because by chance it would seem that one
24 of the witnesses that Jean de Dieu Momo cross-examined, who is, by the way, AKJ, was found to be
25 credible by the Trial Chamber, because Mr. Jean de Dieu Momo did not cross-examine several
26 witnesses, but it so happens that it was AKJ whose testimony --

27
28 Thank you, Mr. President. In fact, I was almost at the conclusion of our oral submissions, but I would
29 wish to respond or react to a question which was raised this morning by the Defence of Mr. Bikindi
30 regarding direct and public incitement to commit genocide. He referred to the appeal judgement in
31 *Nahimana*. He said that Ngeze was acquitted for direct and public incitement to commit genocide
32 because the time -- the time frame of the offence was not determined.

33
34 I do not wish that my learned friend misleads the Appeals Chamber. He misinterpreted the paragraphs
35 of the *Nahimana* appeal judgement which he quoted this morning.

36
37 Ngeze was acquitted of that incident because the witness Serushago was not found credible. There

1 were several incidents involved. And, if you wish, I could read to you paragraph 18 -- 888, which says
2 that Ngeze often travelled with a megaphone inciting Hutus at CDR meetings and they were to continue
3 in that regard.

4
5 And the Appeals Chamber at paragraph 892 states, however, the Trial Chamber does not specify the
6 moment where the acts alleged took place. So the Trial Chamber does not specify the moment where
7 the alleged acts may have taken place. In the present -- in the instant case, the witness is speaking
8 about June 1994 -- end of June 1994 on the Kivumu-Kayove road. So this is -- the relationship that my
9 learned friend is making with the *Nahimana* appeal judgement is not correct.

10
11 I wish to conclude with that paragraph 892. The witness Serushago refers to events which took place
12 in 1994, and this testimony cannot be taken without corroboration by other evidence which is credible.

13
14 So the Appeals Chamber is speaking of Witness Serushago, who is not credible and who is not
15 corroborated in his evidence. So the comparison provided by our learned friend is not appropriate.

16
17 Your Honours, in summary, we say that the Appellant has failed to show that the Trial Chamber
18 committed errors in the assessment of the testimonies of Witness AKK and AKJ. The issue pertaining
19 to *Opération Turquoise* did not arise because *Opération Turquoise* would not have stopped Bikindi from
20 committing the crime of direct and public incitement to commit genocide on the road from Kivumu to
21 Kayove.

22
23 So all the grounds of appeal submitted by our learned friend, we are requesting that you dismiss them
24 in toto. And that if you do not have any questions on my part of the submissions made, I would pass
25 the floor on to my learned friend Kabasinga.

26 MR. PRESIDENT:

27 Thank you, Mr. Nsanzuwera.

28
29 Ms. Kabasinga, you're up next.

30 MS. KABASINGA:

31 Good afternoon, Your Honours. As my colleague has indicated, I will be submitting on the
32 three arguments that my colleague of the Defence advanced in support of his appeal against sentence.

33
34 I'll be extremely brief in my submissions for two reasons, the first being that my friend of the Defence
35 did not get a chance to address his submissions on sentencing this morning, and the other reason
36 being that as Your Honours are well aware, our entire appeal is based on sentencing. My colleague,
37 Ms. Dior Fall, will be addressing on the same this afternoon at length.

1 I will begin with the jurisprudence of this Tribunal as to when this Chamber can overturn a sentence or
2 replace a sentence on appeal that the Trial Chamber handed down.

3
4 Mr. Bikindi was given 15 years' imprisonment for direct and public incitement to commit genocide. Both
5 the ICTY and the ICTR Appeals Chambers have found previously in *Gacumbitsi* at paragraph 111, in
6 *Kajelijeli* at paragraph 291, in *Semanza* at paragraph 392, and in *Brdjanin*, paragraphs 500 and 501,
7 that an Appeals Chamber will not replace a sentence of a Trial Chamber absent a showing of a
8 discernable error in exercising its discretion or a showing that the Trial Chamber has failed to follow
9 applicable law.

10
11 Now, it is incumbent upon the Appellant to actually demonstrate that the Trial Chamber committed a
12 discernable error in exercising its discretion or that it followed the wrong law or it applied it wrongly. In
13 our opinion, the Appellant has not successfully demonstrated the same.

14
15 In his first argument against sentencing the Appellant claims that the 15 years sentence handed down
16 to him is manifestly excessive and unduly harsh on the ground that direct and public incitement to
17 commit genocide is of a lesser gravity than the crime of genocide. This, we submit, is actually wrong in
18 law and in jurisprudence.

19
20 The Appeals Chamber has found, for example, in *Stakic* at paragraph 375, that there is no hierarchy
21 among the crimes for which this Tribunal has jurisprudence, that, in fact, any of the crimes that are
22 found in the Statute can accrue life imprisonment. Therefore, we find that the Appellant's submission is
23 misplaced and wrong in jurisprudence.

24
25 His argument is supported by the fact that the Trial Chamber made reference to Rwandan law
26 concerning genocide -- sentencing practice concerning genocide yet, it's of a lesser gravity. To begin
27 with, Article 23.1 of the Statute and Rule 101(B)(iii) actually require the Trial Chamber to have recourse
28 to Rwanda sentencing practice.

29
30 Now, if you look at the judgement at paragraph 447, the Trial Chamber actually made reference to
31 Rwandan sentencing practice for genocide, which is correct, since there is no hierarchy among the
32 crimes in the Statute.

33
34 So we fail to see why our friend of the Defence claims that this 15 years' imprisonment is actually
35 manifestly excessive and unduly harsh.

36
37 Turning to his second argument against sentencing, he claims that the Trial Chamber ought to have

1 made reference to the global sentencing trend for direct and public incitement to commit genocide. And
2 in support of this he actually attached some annexes from -- containing provisions from countries such
3 as Ethiopia, Bulgaria, Canada, the US and Jamaica. But in so doing he makes a very big concession.
4 He says that the Trial Chamber does not have an obligation to actually do so. He said that this would
5 have been of useful guidance to the Trial Chamber and argues that since the Trial Chamber did make
6 reference to the Rwandan sentencing practice, it ought to have done so to global -- other countries,
7 other national jurisdictions, which is extremely wrong.

8
9 The Rules and the Statute require the Trial Chamber to makes reference to Rwandan law, but not to
10 others. So his argument that, indeed, the Appellant could have gotten between five to
11 ten years' imprisonment if the Trial Chamber had made reference to national jurisdictions is also wrong
12 in a major way because he doesn't make reference to the jurisprudence of this Tribunal and the
13 sentencing practice of this Tribunal in fact.

14
15 As my colleague will elaborate later this afternoon, if we look at the sentencing practice of this Tribunal,
16 we will realise that actually the sentencing range is between 30 years and life imprisonment. So, in
17 view of this, we believe that his argument is also misplaced and falls on the wayside.

18
19 When it comes to his third argument against sentencing, the Appellant argues that the Trial Chamber
20 wrongly analysed the individual circumstances and the mitigating factors in this case and gave a
21 sentence of 15 years' imprisonment when he, indeed, should have gotten less. I would like to point out
22 at the beginning that all the mitigating factors which the Appellant reiterates on appeal were actually
23 considered by the Trial Chamber. And, indeed, the Trial Chamber explained why they did not give
24 weight to these mitigating factors or why they didn't find them to be mitigating factors. And this is
25 supported by jurisprudence.

26
27 According to this Appeals Chamber in *Nahimana* and others at paragraph 1038, subparagraph 3, and
28 *Kajelijeli*, paragraph 299, this Chamber found that although the Trial Chamber is required to take into
29 account mitigating circumstances, what constitutes such circumstances and what weight to be
30 accorded to it lies in the Trial Chamber's discretion.

31
32 The Appellant argues in his brief that the Trial Chamber did not explain why it did not find these
33 advanced mitigating factors to be such. This is wrong, Your Honours. And as I go along I will point to
34 you what -- paragraphs in the judgement where the explanations were given.

35
36 The first advanced mitigating factor that the Appellant points out to the Appeals Chamber is that he
37 ought to have been given less time in prison because there were no resultant deaths from his

1 statements. Your Honours, this is wrong, if you look at the jurisprudence of this Tribunal.

2
3 Let me refer you to *Nahimana* and others at paragraph 678 where it was found that direct and public
4 incitement to commit genocide is itself a crime and it is not necessary to demonstrate that it, in fact,
5 substantially contributed to the commission of genocide. Meaning that by the mere fact that he actually
6 uttered those words he should have been punished, regardless of whether or not there were
7 subsequent killings. And, as I've already mentioned, he could have been subjected to life
8 imprisonment, but he only got 15 years' imprisonment, which we submit is actually lenient.

9
10 The second advanced mitigating factor is that the Appellant should have been given, as a mitigating
11 factor, credit for assisting before, during and after, members of the Tutsi ethnicity.

12
13 This was considered by the Trial Chamber at paragraph 457, and the Trial Chamber explained why it
14 did not give any credit for this. According to the Trial Chamber, it considered that Bikindi's good
15 relationship with some Tutsi neighbours and Tutsi members of his ballet is not significant and shall not
16 have any bearing on sentencing in this case.

17
18 The Trial Chamber also says that Bikindi only provided selective assistance to Tutsi during the
19 genocide, namely, Tutsi in his circle, such as members of his troupe. Such selective assistance is not
20 decisive in the Chamber's view. So, in exercising its discretion the Trial Chamber actually explained
21 why it did not give any weight to this, which it had every right to do because it has discretion to do so.

22
23 The other advanced mitigating factor is that Bikindi composed songs asking for peace. This was also
24 considered by the Trial Chamber at paragraph 456. No weight was given to this as a mitigating factor
25 because the Chamber considered that while he did so, he actually composed songs with the opposite
26 intent and effect. It found at paragraph 254 of the judgement that his three songs, *Twasezereye*,
27 *Nanga abahutu* and *Bene sabahinzi*, in fact, had the effect of propagating pro-Hutu ideology and
28 anti-Tutsi propaganda. Therefore, the Chamber found that there was no reason to find this as a
29 mitigating factor and gave it no weight.

30
31 Lastly, the Appellant claims that he should have been given credit for his contribution to Rwandan
32 society. This too was considered by the Trial Chamber at paragraph 455, and no weight was given to
33 it. In fact, what the Trial Chamber did was consider that because he was a person of such high stature,
34 his actions -- by carrying out his action, he actually abused his stature in Rwanda. And it found that this
35 was actually an aggravating factor at paragraph 451 of the judgement. So we fail to see how the
36 Appellant hopes to succeed on this.

1 As I've already explained, it is incumbent upon the Appellant to actually demonstrate that a discernable
2 error has been committed on the part of the Trial Chamber, but we fail to see any demonstration of that,
3 and we ask this Chamber to dismiss all the arguments against sentence in this -- in this hearing.

4

5 I'm grateful.

6 MR. PRESIDENT:

7 Thank you very much.

8

9 Judge Liu, please.

10 JUDGE LIU:

11 I just want to ask a question to the Prosecution that you mentioned that the Appellant, you know,
12 mentioned that a global sentence trend as well as the sentencing practice of Rwanda. In the Appellant
13 respondent brief, they mentioned two cases in the Rwanda domestic court. One is the Karamira case,
14 the other the Gataza case. I believe that in one case the prosecutor requested a sentence of two years'
15 imprisonment for the incitement of genocide.

16

17 We haven't received any response from the Prosecution's side concerning those two specific cases.

18 So I would like to know what's your view. How do you see the significance and the influence of those
19 two cases in this present case? Thank you.

20 MS. KABASINGA:

21 Thank you, Your Honour. If my memory serves me correctly, Karamira was actually sentenced to death
22 eventually in Rwanda, and that sentence was carried out.

23

24 And let me just mention that the jurisprudence of this Tribunal states that there is no hierarchy among
25 the crimes. So if -- the Accused can actually be subjected to life imprisonment for direct and public
26 incitement to commit genocide. Even having reference to those two cases in Rwanda, it would not
27 make a difference to the proceedings before this Chamber.

28 JUDGE LIU:

29 Thank you.

30 MR. PRESIDENT:

31 I've been thinking, Ms. Kabasinga, about your repeated references to no hierarchy among the crimes
32 and wondering whether you're stating it correctly. I happen to have been in the first instance case
33 where The Hague Tribunal made that determination. And the first comment that I would make is, yes,
34 there is no hierarchy between the crimes, no hierarchy between genocide and war crimes or genocide
35 and crimes against humanity.

36

37 In the case that was actually being considered what was being contended, if my memory is correct, is

1 that war crimes was of a lower order than crimes against humanity or perhaps genocide, whichever one
2 is called the mother of crimes. And so I wonder whether you're correct to be comparing, to be having
3 an internal comparison between the crime of direct and public incitement to commit genocide and
4 genocide itself.

5
6 The second point I wanted to make is that, true, there is no hierarchy among the crimes, and that's a
7 proper principle, but that doesn't mean that you can't look at the facts that in a particular case constitute
8 direct and public incitement to commit genocide and compare it quite properly with the facts in another
9 case that constitute, say, war crimes and come to a comparison as to which is more serious. In fact, I
10 think that is a requirement, and that is done quite often in sentencing.

11 MS. KABASINGA:

12 Thank you, Mr. President. You are right that in actually all the cases the argument hinges on the
13 gravity of the offences and of the particular circumstances of the accused. But as far as which crime is
14 of a higher gravity, it is an argument that actually my colleague will handle in the afternoon because, if
15 you look at the *travaux préparatoire* of the genocide convention, actually, the crime of direct and public
16 incitement to commit genocide was considered to be of a higher gravity than actually genocide, which is
17 called the mother of all crimes.

18
19 So as my colleague will actually show, if you look at the gravity, direct and public incitement to commit
20 genocide is --

21 MR. PRESIDENT:

22 It is the mother of all crimes.

23 MS. KABASINGA:

24 Genocide is, but it is part of genocide.

25 MR. PRESIDENT:

26 Anyway, don't trouble yourself unduly.

27

28 Are we now to take the break?

29

30 Mr. O'Shea will reply.

31 MR. O'SHEA:

32 I think I recall that in the Nuremberg tribunal aggression was the mother of all crimes.

33 MR. PRESIDENT:

34 It's a characterisation that seems to vary with the time.

35 MR. O'SHEA:

36 Your Honours, I would like to begin by -- I invited Your Honours during the course of my submissions to
37 have a look at the transcripts of BGH where the issue of the video of the meeting of the

1 7th of November was discussed. And I'd just like, in order to assist Your Honours, to highlight certain
2 page and paragraph numbers so that you're in a position to do that exercise.

3
4 The sentence where counsel states, "That chaos was the area in which Bikindi and his troupe were
5 said to be on the video," and this time I'm quoting directly, that sentence is contained in the transcripts
6 of the 3rd of October 2006 at page 34, line 17 and 18. But so that Your Honours can actually follow the
7 progression of what happened there, I refer Your Honours to page 21, line 11; page 21, line 18;
8 page 21, lines 32 to 33; page 22, lines 18 and 22; page 23, line 9 -- which is the only observation from
9 the Defence; I was asked about that -- and line 12; page 24, line 7; page 25, line 12 to 13; page 25, line
10 18; and page 25, line 26 to 27.

11
12 It was on reading those particular parts of the transcript which led me to the conclusion that
13 "manipulation" was the only appropriate word.

14
15 Now, with regard to the issue of whether the Defence raised the issue of the incompetence of
16 Mr. Momo during the trial, we have deliberately moved away of talking about the incompetence of
17 Mr. Momo and prefer to use the expression "ineffective assistance of counsel." That is why I referred
18 Your Honours to that jurisprudence which Mr. President himself had highlighted earlier about the
19 impact.

20
21 We did, in fact, in our closing brief allude to the issue, not in the most direct terms, but in a manner to
22 invite the Trial Chamber, who, of course, were there, to take these matters into account. We did that at
23 paragraph 495 to 499 of the closing brief in the discussion of Witness BUY, who was also
24 cross-examined by *Maitre* Momo. We also raised it specifically with regard to the cross-examination of
25 Witness AKJ at paragraph 165 of our closing brief.

26
27 When we raised this at paragraph 165, we raised the poor quality of the cross-examination but not to
28 the same -- to the same elaborate extent as we are doing today.

29
30 Now, in the preparation of the closing brief, the question of the ineffective of assistance of counsel in
31 the cross-examination of AKY was a minute issue among all the issues in the case, and it was not an
32 issue which we at that time thought would have an impact on the outcome, because, first of all, we
33 believed that the -- if we could succeed in establishing the date of the death of Father Gatore, we
34 believed that the evidence of AKK was finished. That was our belief of the evidence at that time.

35
36 Also, we could not, in fact, predict where we are today at that time because it is in the Trial Chamber's
37 judgement that the Trial Chamber makes the following statement that there is slight confusion in the

1 dates but that we -- we accord that to counsel and put no blame on the witness.

2
3 It is our submission that the Trial Chamber did not have open to them that particular finding.
4 Your Honours only have to have regard to page 17 on the 21st of September 2006, and Your Honours
5 will see there that the presiding Judge puts a direct question to the witness and gets a direct answer
6 back. Your Honours can look at the exact words, but the essence of it is: Mr. Witness, in which year is
7 this incident with the megaphone on top of the vehicle, 1993 or 1994? And the clear answer that
8 comes back is 1993.

9
10 So there is a contradiction in the evidence and because -- and because of the way in which that
11 evidence came out, we say that the conclusion that the Trial Chamber reached that it was entirely the
12 fault of counsel was not a conclusion open to them. But having -- so that's why we couldn't predict it
13 before. But having made that conclusion in the judgement, we are now strained to pursue vigorously
14 this issue of incompetence as counsel as part of our appeal. So the conditions at the time of the trial
15 were not the same as the conditions today.

16
17 If I may move on to the question of sentencing.

18
19 The Trial Chamber has an obligation to have regard to the gravity of an offence. Hierarchy and gravity
20 mean different things.

21 MR. PRESIDENT:

22 I'm sorry. Please continue.

23 MR. O'SHEA:

24 Sorry, Mr. President. Thank you.

25
26 But the word which is the focus of our attention before this appeal is the word "gravity". We submit that
27 a court does have a duty to look at the actual gravity of an offence, both its inherent gravity and its
28 gravity having regard to the individual circumstances of the case.

29
30 And, in our submission, if one looks at the offence allegedly committed by Mr. Bikindi, that offence
31 constitutes, first of all, direct and public incitement. Now, direct and public incitement, as Your Honours
32 observed in the Media case -- Your Honours observed in the Media case that the crime is committed
33 once the words have been uttered. That was at paragraph 723 of that judgement.

34
35 So, once the words have been uttered, the crime has been completed. And this is where myself and
36 my learned friend accord, because we both agree that we are dealing with an inchoate offence. The
37 Prosecution is saying that, "Well, because we're dealing with an inchoate offence, that highlights the

1 flaw in the Defence argument." We say because we're dealing with an inchoate offence and in
2 particular because we are dealing with -- the essence of this offence is words, the inherent gravity of
3 the offence of direct and public incitement cannot, in principle, be the same as taking the lives or
4 attempting to take the lives -- sorry, of taking the lives of a substantial part of the population, which
5 would, of course, constitute an act of genocide.

6
7 One has to, of course, look at the -- once one looks at the inherent gravity, one has to then go on to
8 look at the individual circumstances.

9
10 And in the Karamira case, for example, which is one of the Rwandan cases, which one of your
11 Your Honours has just referred to in asking a question to the Prosecution, Judge Liu I think it was. In
12 that case Karamira was charged with several matters, all related to the principle offence of genocide,
13 one of which was incitement.

14
15 The Prosecutor asked for two years for the incitement, but his ultimate sentence depended on the fact
16 that he had substantial involvement in the genocide in different ways, which were expressed legally in
17 different ways. So lives had been taken on a massive scale as a result of the conduct of Mr. Karamira,
18 which expressed the ultimate outcome of that case.

19
20 In this case we are dealing with two very short statements made on a single day. That is the context in
21 which we are talking in sentencing. Without trying to undermine the seriousness of those statements
22 which were made, without trying to undermine the seriousness of them, comparatively with other cases
23 of direct and public incitement, it is a case we say of lesser gravity.

24
25 There are cases of politicians who make statements calling on the population to commit genocide, and
26 those statements are then executed over a very long period of time. In the context of Rwanda, there
27 are cases where the statements of accused have had a continuing impact between the beginning of the
28 genocide, April, until the end of the genocide in July.

29
30 So those are, contextually speaking, different types of scenarios. There are cases where incitement is
31 mixed up with planning.

32
33 So there are many different kinds of scenarios that one can imagine which would be serious examples
34 of direct and public incitement to commit genocide. The words themselves that Bikindi used are
35 inherent to the crime of direct and public incitement. Those words necessarily have to be there for him
36 to be guilty of the offence to begin with, or words of a similar nature or similar purport.

1 So then one has to look at the surrounding circumstances. No deaths were attached on the evidence
2 to those two statements which were made. Deaths were attached to another statement, which I earlier
3 stated would in law amount to instigation and was not the subject of the case, the statements – the
4 statement at the roadblock on the way back from Kayove.

5
6 But even in the deaths mentioned in the context of what happened following that statement at the
7 roadblock included the death of Father Gatore. And the Chamber gave the Defence the benefit of the
8 doubt on that. So with regard to the offence with which he was convicted, no deaths resulted. Even
9 with regard to the collateral matter of another statement he made at a roadblock, it must be taken that
10 the deaths are not established because of the finding with respect to Mr. Gatore. But even that second
11 element, we don't have to go there because the issue here is the crime with which he was charged and
12 convicted.

13
14 Now, the one issue is to what extent should the Trial Chamber have regard to national jurisprudence.
15 And we've dealt with that in our brief. But, of course, this national jurisdiction is before Your Honours,
16 before the Appeals Chamber in the pleadings. And Your Honours in the Appeals Chamber will have to
17 address the question of what is the -- what is the inherent gravity of the offence of direct and public
18 incitement to commit genocide? And what is the gravity of the offence, having regard to the individual
19 circumstances of this case?

20
21 And these national laws, in my submission, are persuasive to Your Honours that there is or should be a
22 distinction between the crime of completed genocide and the crime of direct and public incitement to
23 commit genocide, excepting, of course, that there might be very serious cases of direct and public
24 incitement where the incitement occurs and then subsequently to that masses of people are, in fact,
25 killed. In those instances, the fact that masses of people are, in fact, killed would be a very serious
26 aggravating feature to the crime and would have a heavy impact to the sentence. But the circumstance
27 of this case, we submit that the principles set out in national legislation are highly persuasive.

28
29 Part of the documents that I referred up to Your Honours were the Rwandan laws, and I would like to
30 briefly explain what our understanding of the Rwandan law is.

31
32 At the first tab -- or under the first red tab in Your Honours' binders you would find the provisions of -- or
33 certain provisions of the Rwandan penal code. You will then, under the yellow tab -- or the next tab,
34 find the organic law of 1996 on the crime of genocide and crimes against humanity. And then in the
35 third tab you will find the organic law of 2004 dealing with jurisdiction Gacaca in the context of genocide
36 and crimes against humanity.

1 Now, the position -- my understanding is that the position under Rwandan law -- and let me put it more
2 specifically. The position under Rwandan law of Mr. Bikindi, if we pose the hypothetical situation, what
3 if Mr. Bikindi was being tried in Rwanda is as follows: First of all, Mr. Bikindi's indictment is dated 2001.
4 And, therefore, in my submission, the third law, which I've referred to, the jurisdiction Gacaca law of
5 2004, would not be applicable to him for that reason because it would have to be applied
6 retrospectively.

7
8 Secondly, the third law would not be applicable to Mr. Bikindi to the extent -- to the extent it could be
9 argued that he was in category 1, which is what the Prosecution has argued. And the reason I say that
10 is because category 1 offences are dealt within -- in the normal courts of law. But, of course, this
11 Gacaca law would not apply within the proceedings in the normal courts of law. In the normal courts of
12 law, even today, the law which would be applicable would be the 1996 what is referred to as organic
13 law on genocide and crimes against humanity. Under that law, you will see under category 1 that
14 Bikindi does not fall under those categories.

15
16 To save time, I won't read them, but Your Honours will be able to look at that at ease.

17
18 Even category 2 Mr. Bikindi would not fall.

19
20 Category 3 is ambiguous. Arguably Mr. Bikindi could fall under it; arguably not. But even if he did fall
21 under category 3 in the 1996 law, the 1996 law makes no mention of the offence of direct and public
22 incitement.

23
24 Now, Your Honours will recall that the genocide convention defines genocide, and then after defining
25 genocide, it then goes on in the next section to define acts which are punishable, including, one,
26 genocide, et cetera, et cetera, including, of course, direct and public incitement to commit genocide.

27
28 So, if the Rwandan law was to apply to direct and public incitement, it would have to state it in its law.
29 That would follow by virtue of the principle of legality, because in the law of 1996 it speaks of the crime
30 of genocide but not the crime of direct and public incitement expressly and under Rwandan law is a civil
31 law jurisdiction, and the principle of legality would apply, it would have to.

32
33 So that leaves us with the penal code. And it is Article 166 of the penal code which, to my
34 understanding, was applied in the Karamira case. And it's in French, so I will read it into the record just
35 to assist Your Honours.

36
37 So, Madam Translator, I'm moving into not-so-good French: "Whoever, either through meetings held in

1 a public place or in writing, printed material, distributed, disseminated, sold or exposed to the public
2 either consciously, falsely disseminating information intended to incite the people against the
3 established authorities or to get the people to rise against each other, thereby creating disturbances
4 under national territory, shall be punishable by imprisonment of between two and ten years and pay a
5 fine of between 2,000 – 2,000 and 100,000 francs. And this is without prejudice to other provisions of
6 the present code."

7
8 *(Microphones overlapping)*...if he were tried in Rwanda. And in the light of that, it was not fair for the
9 Trial Chamber Judges to simply state that in Rwanda the crime of genocide carries a maximum
10 sentence of life imprisonment without going into further details, given this scenario. And it is a bit
11 misleading, in my submission, to state that direct and public incitement is of similarly gravity to the
12 crime of genocide, without further elaboration.

13
14 So, in our submission, there is a discernable error in the way this Trial Chamber viewed the gravity of
15 this particular events.

16
17 Six minutes.

18 MR. PRESIDENT:

19 I think you saw that.

20 MR. O'SHEA:

21 Yes.

22
23 With regard to the songs about peace being a mitigating factor, I would say this: Two of those songs
24 were composed after the genocide in exile, one before. And in my submission it's wrong for the
25 Trial Chamber to say that there's kind of a balance between the fact that he sung songs about peace
26 and the fact that he sung songs about hatred. That ignores the fact that a person can change, which is
27 one of the motivating factors for considering mitigation in a criminal case.

28
29 Also, we submit that the Trial Chamber was wrong in classifying these songs as hate speech and then
30 using that in the sentence to prevent him from getting mitigation for songs about peace, because the
31 charge of the Prosecution in relation to these songs did not carry, and the Trial Chamber admitted that
32 they accepted that the experts for the Defence and the experts for the Prosecution could come to
33 different interpretations of this text or the texts of the songs. And it was not open, in those
34 circumstances, to the Trial Chamber to then classify those songs as hate speech, talking about the
35 context in Rwanda in general terms and effectively, in our submission, ignoring what Bikindi had said
36 about the context in Rwanda when he composed those songs.

37

1 And that is found -- those footnotes are found in the corrected version of the Appellant's brief.

2
3 So I think my time is up. There was one point raised by my learned friend, Ms. Kabasinga, where she
4 spoke of our concession with regard to what a Trial Chamber is obliged to do. Yes, we concede that
5 there is no obligation to have regard to any national law -- sorry, no obligation to follow any national law,
6 including Rwandan law. And there is, in principle, no obligation to follow any particular national law.
7 However, there is an obligation to take into account relevant factors. And we say that in the context of
8 this case, there were relevant -- relevant national legislation which was important.

9
10 Those are my submissions, unless Your Honours need any further clarifications.

11 MR. PRESIDENT:

12 Thank you very much.

13
14 For this afternoon, unless I hear that anyone is prejudiced by starting at 2:30, that's the time that I
15 proposed we start this afternoon.

16
17 Start at 2:30.

18 *(Court recessed from 1257H to 1430H)*

19 MR. PRESIDENT:

20 We will begin first with the *amicus curiae* motion. And who is first? Who is first?

21
22 You want to be first?

23 MR. O'SHEA:

24 I don't mind, Mr. President. I suppose it's my appeal.

25 MR. PRESIDENT:

26 Yes.

27 MR. O'SHEA:

28 Right. Now, we've tried to have a look at the legal position insofar as we've been able to in the break.
29 And it would appear that since the aspect is being placed in these terms that the relevant rule is
30 Rule 74 of the Rules of Procedure and Evidence, which states that: "The Chamber may, if it considers
31 it desirable for the proper determination of a case, invite or grant leave to any state, organisation or
32 person to appear before it and make submissions on any issue specified by the Chamber."

33
34 We've also been able to determine that there is an authority, Prosecutor in *Kayishema*, which was a
35 decision on ADAD's motion for reconsideration of a request for leave to appear as *amicus curiae* dated
36 the 1st of July 2008. And at paragraph 12 of that decision it appears that it's suggested that impartiality
37 is not a precondition for an *amicus curiae*.

1 What is the position of the Appellant? Well, our position is this: That, yes, this Chamber has the power
2 that's clearly provided for in the Rules, but that is a discretion, and it is a discretion which needs to be
3 exercised bearing in mind the purpose of these proceedings and the interests of the Accused. This is,
4 of course, an appeal from a criminal trial.

5
6 So in exercising Your Honours' discretion in this matter, I would invite Your Honours to take into
7 account the following factors: First of all, I would invite Your Honours to take into account the view of
8 Mr. Bikindi himself. Mr. Bikindi himself tells me he is against the idea of an *amicus* submission from
9 Mr. Momo.

10
11 The second factor we would invite the Appeals Chamber to take into account is the purpose and nature
12 of this submission. I still have not read the content of the document. I still don't have a copy of it. That
13 probably doesn't matter at this stage. But the Appeals Chamber should ask itself, in our submission,
14 why is Mr. Momo coming to ask for permission to be *amicus curiae* in these proceedings.

15
16 Now, while impartiality per se is not a bar, in our submission, it is a factor for Your Honours to take into
17 account on the facts of an individual case.

18
19 Now, here one of the grounds of appeal is ineffective assistance of counsel and relates to the
20 cross-examination of Mr. Momo. If we were concerned with, for example, a university or a bar or a
21 state, even if they had an interest in the matter and therefore were not completely impartial, they would
22 be coming to the proceedings with a view to addressing the issues in the case from a perspective,
23 which is one of the perspectives of the parties probably.

24
25 In this instance, Mr. Momo is probably not wishing to represent the interests of the Accused, but again I
26 don't know the content of his document. He's probably coming to represent his own interests. And the
27 question arises, is it in the interests of the fair administration of justice in a criminal appeal for a person
28 who is a matter of discussion in that appeal to come and represent his own interests in the matter?

29
30 As one of Your Honours has pointed out --

31 MR. PRESIDENT:

32 To follow the language of 74, is it in the interest of the proper determination of this case.

33 MR. O'SHEA:

34 Yes, indeed.

35
36 And it was rightly pointed out by you yourself, Mr. President, earlier that the issue of ineffective
37 assistance of counsel is not directed at any kind of disciplinary hearing. This is not a personal question.

1 This is about what -- has the Accused received effective assistance at that moment in the trial, and
2 what was the impact on the trial, and was there a miscarriage of justice?

3
4 How are those determined? They are determined by issues of legal principles. I don't believe that
5 Mr. Momo has any particular expertise which is going to add to the knowledge Your Honours already
6 have in that regard. And it is contained in the evidence in the record before this Appeals Chamber.
7 And the evidence of the ineffective assistance of counsel is the cross-examination itself in the
8 transcripts, the references in the judgement that the Judges made, and the documents which have
9 been annexed to the pleadings, including the letters from Mr. Bikindi to the registry, the note from
10 Mr. Bikindi to his team, and Mr. Bikindi's declaration before Your Honours. That is the total parameters
11 of the evidence, because that is the evidence on the record.

12
13 So unless Mr. Momo is asking for us to include other evidence, it is not -- it's not in the interests of the
14 justice, in our submission, that he make submissions in this appeal.

15
16 The other procedural point I would make is I would question whether it would be appropriate to allow
17 this procedurally. Is it appropriate to permit a person to act as *amicus curiae* on the basis of a
18 document which is emailed in the afternoon before the appeal hearing? If we were dealing with an
19 accused person in a criminal trial -- Your Honour will recall the case of Seselj, where I was a standby
20 counsel at one stage, where the Appeals Chamber accepted a letter from Mr. Seselj as a basis for
21 appeal.

22 MR. PRESIDENT:

23 Please continue.

24 MR. O'SHEA:

25 The Appeals Chamber accepted a letter from Mr. Seselj. Mr. Seselj was ill at the time. So, you know,
26 the Appeals Chamber can be fair. It can, you know, accept appeals and accept submissions and
27 applications, you know, in specific circumstances. But this is a trained lawyer, and I don't -- I would
28 submit that it's not appropriate to accept that it's procedurally correct for him to come to the Court by
29 virtue of an email the day before the hearing, and I would not allow it on that basis alone.

30 MR. PRESIDENT:

31 Yes.

32
33 And for the Prosecution?

34 MR. OBOTE-ODORA:

35 Good afternoon, Mr. President. Good afternoon, Honourable Judges. In this respect, I join issues with
36 counsel for the Defence. In granting leave to make submissions under Rule 74, we concede that the
37 Court has the discretion, the Chamber has the discretion.

1 But primarily the main criteria for determining whether or not to grant permission for *amicus* to assist the
2 Appeals Chamber is the consideration whether they can assist in determining the issues before the
3 Appeals Chamber itself. And in this particular instance, what we recognise is that Mr. Momo, as
4 co-counsel, is an interested party. He had lots of other interests that he seeks. From looking at his
5 affidavit, which I had a brief translation over lunchtime, he makes a series of allegations against the
6 Office of the Prosecutor. And even if those allegations were true or not, this would not be the proper
7 forum because he cannot come here as a party to these particular proceedings.

8
9 As an *amicus*, what other information would he provide to the Appeals Chamber to assist the Court in
10 determining the issues at hand? We have tried to look at those issues, and we do not find any
11 reasonable basis upon which he could be asked to function as an *amicus*.

12
13 But, at the same time, we recognise that the Court has discretion, and the Prosecution has no strong
14 views on this particular point and leaves the matter to the discretion of the Court.

15
16 Thank you, Your Honours.

17 MR. PRESIDENT:

18 The Chamber has heard the submissions from both parties, and the Chamber expresses its gratitude
19 for those submissions. The Chamber has not been persuaded that granting this application would be in
20 the interest of the proper determination of the case and in the interests of justice. And for those
21 reasons, the motion is denied.

22
23 The next motion is the motion for reconsideration in relation to the Chamber's decision under Rule 112.

24
25 I think you would begin, Mr. O'Shea.

26 MR. O'SHEA:

27 Yes. Thank you, Your Honour.

28
29 If Your Honour could just give me one moment.

30
31 Yes. Your Honour, I raised earlier a request that the Appeals Chamber reconsider part of its decision
32 on the motions for additional evidence, decision of the 16th of September 2009. And I make -- I make
33 that submission principally on the basis of the integral importance of the point to this appeal.

34
35 Now, what I can say by way of assistance is that I realise that there are also practical implications to
36 this and that the evidence relating to Bikindi's presence in Germany may be divided into different
37 strands, and half of those strands involve witness testimony. I can put that part of the evidence aside

1 and simply request the admission of the documentary evidence, which has probative value on its face.
2 And here I'm referring to the programme of the tour, the newspaper articles and the photographs.

3
4 Normally, one would introduce that kind of evidence through a witness, but I think it is possible to
5 consider -- under the Rules of this Tribunal possible to consider documentary evidence which can be
6 considered on its face. And so I will confine my submission to those documents and not expand it to
7 the entirety of the evidence, including witness testimony, because I realise the practical implications of
8 that.

9
10 The decision of this Chamber states at paragraph 12 that, "Mr. Bikindi's submissions fail to appreciate
11 that ultimately the Trial Chamber did not accept the specific date of either May or June mentioned
12 during the witness's testimony and its findings instead referred only generally to the event happening in
13 1993." And then refers to paragraphs 141 and 183.

14
15 In our submission, that -- that statement is respectfully I say based upon a false premises in the sense
16 that paragraph 135 of the judgement states that the Prosecution witness AKJ testified that he saw
17 Bikindi for the first time at an MRND political rally held at the football field in Kivumu *secteur*,
18 Nyamyumba *commune*, Gisenyi *préfecture* around the 15th of May 1993.

19
20 Now, while the Chamber may not have stated that it accepted or rejected May, by setting out the
21 testimony of AKJ and then stating that it believed that evidence and then subsequently relying upon it,
22 my submission is that even though the Chamber recognised the difficulties and confusions over the
23 dates generally in the judgement, it did, in fact, misconstrue the testimony of AKJ.

24
25 At page 15 of the transcript of the 21st of September it is stated by the witness, at line 18 and 19, that it
26 was on -- around the 15th of May. Counsel then puts to the witness: "Can I put it to you that it probably
27 was the on 6th of June 1993?" And the response is: "Well, what I have said is that the rally took place
28 in 1993 in the month of June, but I do not remember the exact date."

29
30 And then at page 17 on lines 30 to 34, the question is put: "Well, Witness" -- and counsel comes back
31 to the issue -- "it is your testimony that you first saw Bikindi in 1993 in the month of May; is that
32 correct?" "No, no. It was in the month of June. It was in the month June." "In 1993?" "Yes."

33
34 Now, in my respectful submission, in those circumstances, the evidence which has come out with
35 respect to 1993 from that witness, whatever other confusion there might be, was with respect to what
36 incident is applying to which year, the evidence is clearly directed -- or the witness is clearly directing
37 himself at the month of June as being the appropriate time.

1 Now, how does that prejudice or how does that cause miscarriage of justice to the Appellant? It does
2 so for the following reasons: First of all, if you -- if Your Honours look at paragraph 136, where the
3 claim is dealing with the confusion on the dates and attributing it solely to the method of questioning of
4 Defence counsel, now that goes to the fifth ground of appeal.

5
6 The fifth ground of appeal deals with ineffective assistance of counsel, and the Chamber actually
7 blames counsel for the confusion in the dates of the witness. So, in our submission, if we can establish
8 that Mr. Bikindi -- if we can establish very affirmatively that Mr. Bikindi was in Germany in the whole of
9 the month of June in the year 1993, then we can establish that prejudice was caused -- or this is one of
10 the ways we can establish that prejudice was caused by the ineffective assistance of counsel.

11
12 If Your Honours then look at 267 in the judgement, paragraph 267, that is the -- that is the part of the
13 evidence where the Chamber begins to discuss the issue in this appeal, which is the conviction on the
14 public speaker incident. And at that paragraph it is stated: "The Chamber recalls that it accepted their
15 evidence," their evidence being AKK and AKJ, "regarding Bikindi's presence and statements at a rally in
16 Kivumu in 1993."

17
18 Now, given the sections of the transcript which I've read out, which clearly show the witness sticking to
19 the month of June 1993, insofar as the incident in 1993, whatever that incident is, the fact that Bikindi
20 was, in fact, in Germany in June goes directly to the credibility and, of course, reliability of the witness.
21 And that being the case, it wasn't open to the Trial Chamber to then make a finding that -- or recall that
22 it had made that finding in relation to Kivumu to support its contention that it believes these witnesses
23 with regard to what they say about 1994.

24
25 And the third reason for prejudice is contained at paragraph 72 of the judgement. "Although the
26 Chamber is unable to conclude that Bikindi had any official role in the party, it finds that he was
27 perceived to be an influential member of the MRND." And then at paragraph 451, that is relied upon in
28 sentencing.

29
30 One of the factors it takes into account with regard to that is the address that he makes at Kivumu
31 meeting in 1993. So if we can powerfully challenge the credibility and/or reliability of AKJ with regard to
32 what he says about 1993, then it also goes to this issue of the MRND and how Bikindi was perceived
33 within the MRND.

34
35 And Your Honours will see from the written submissions that we point out that the other factors do not
36 support that finding either. The Karemera speech doesn't show anything. The statements of BCH
37 simply show discussions between a musician and politicians. That doesn't show anything. And the

1 7th of November meeting is the question of the video that I got all uppity about.

2
3 So, in my respectful submission, we already have the evidence of Bikindi, which I have said that the
4 Trial Chamber ought to have taken into account, even if Bikindi had a slip of the tongue on the year.
5 But that evidence would be corroborated by this documentary evidence which very powerfully
6 establishes that during the whole of the month of June 1993 Bikindi was, in fact, in Germany. And in
7 our submission, that goes directly to the credibility of AKJ, given the way he expressed himself during
8 the evidence. And, therefore, not allowing that evidence to be dealt with, if it's found that Bikindi's
9 evidence by itself is not sufficient or is weak or hinges on the slip of the tongue, then we could end up
10 with a miscarriage of justice. Thank you.

11 MR. PRESIDENT:

12 Thank you.

13

14 Yes, the Prosecution?

15 MR. OBOTE-ODORA:

16 Thank you, Mr. President.

17

18 The Prosecution submits respectfully that the motion should be dismissed in its entirety for the following
19 reasons: While the Chamber has an inherent discretionary power to reconsider a previous decision, it
20 only does so in exceptional circumstances and only if a clear error of reasoning has been demonstrated
21 or if it is necessary to prevent an injustice.

22

23 Now, this basic, minimum requirement has not been demonstrated that the Appellant has met this test.

24

25 First, there is no new circumstances. In particular, when the Court is aware that on the
26 16th of September the Rule 115 motion was dismissed, which covers all these issues that is currently
27 being reargued. So within the Rule 115, which the Appellant filed, none of the issues that he raised
28 today can be considered as new matters or falling within exceptional circumstances or, indeed,
29 intended to prevent an injustice.

30

31 What the Appellant seeks to do is, through the back window, to bring in evidence that had been, one,
32 rejected under Rule 115 and, two, issues that were litigated at trial which he now seeks to litigate these
33 same issues before the Appeals Chamber.

34

35 So it is submitted, Your Honours, that this motion should be denied in its entirety. And I will not go to
36 the facts that were litigated at trial, because that is really not the issues that should be considered for
37 the purpose this motion.

1 Thank you very much, Your Honour.

2 MR. PRESIDENT:

3 Thank you, Mr. Obote-Odora.

4
5 The Chamber is grateful to both parties for their submissions, and we will reserve our decision on this
6 motion.

7
8 Let us return to the main business now. We are now to hear the Prosecution's appeal on sentence,
9 and that's for Ms. Fall, I believe.

10
11 We'll hear your submissions.

12 MS. FALL:

13 Good afternoon, Mr. President, Your Honours. I also wish to greet the Defence.

14
15 My name is Dior Fall and I am representing the Office of the Prosecutor in this matter and the sentence
16 against Simon Bikindi.

17
18 The combination of Article 23.2 and 101 determine the criteria to be applied with regard to the
19 determination of sentence.

20
21 Given the combination of those two, articles and the rule, we believe that the Trial Chamber in imposing
22 a sentence of 15 years' imprisonment on the Appellant for the crime of direct and public incitement to
23 commit genocide rendered a decision which is not compatible with the Rules applying in sentencing.

24
25 In order to set our situation, we are going to look at the four criteria which have been brought about by
26 the combination of those two rules -- the article and the rule in regard to the participation of the
27 respondent in the crimes and then the consideration of aggravating and mitigating circumstances, the
28 scope of the sentences that can be applied in Rwanda and within the Tribunal.

29
30 With regard to the first point, Mr. President, Your Honours, we say that when the Trial Chamber
31 imposed a sentence of 15 years, it did not take into account the gravity of the crime of direct and public
32 incitement to genocide. Mr. President, Your Honours, Article 23.2 of the Statute, it is required that
33 Trial Chambers take into account the gravity of the offence, which means that the seriousness of the
34 crime is the serious element -- serious determining element which the Trial Chamber should consider in
35 sentencing.

36
37 And this appears in *Delic* at -- and *Aleksovski* and the *Celebici* judgement, *Kambanda*, paragraph 125,

1 which all confirm that the decisive test for such a sentence is the gravity of the offence. Therefore, we
2 require that particular circumstances of the case be taken into account and then the form and the
3 degree of the participation of the Appellant in the crime. This is at paragraph 852 in the *Kupreskic*
4 judgement and the *Akayesu* judgement at paragraph 413.

5
6 Mr. President, this morning we had a small discussion regarding the hierarchy to be -- determine those
7 offences. Now, we need to focus on the decision of the Trial Chamber because this is an appeal which
8 concerns the judgement rendered. And at paragraph 448, the Chamber made a ruling, and it decided
9 that direct and public incitement to commit genocide is a crime of the most serious gravity which affects
10 the very foundations of society and shocks the conscience of humanity. So we do absolutely agree, on
11 our part, with that ruling of the Trial Chamber.

12
13 We are also in agreement because if we read Article 2 of the Statute with regard to the crime of
14 genocide, we can, indeed, say that we consider that the crime of direct and public incitement has a
15 similar gravity to the crime of genocide itself. And it is interesting -- I believe that your Chamber in its
16 deliberations may provide clarification to us.

17
18 Mr. President, let me continue by saying that since it has been indicated in the *Ruggiu* case, page 6 of
19 the judgement, and *Akayesu*, the crime of genocide is so serious that the crime of direct and public
20 incitement to genocide should be punished, even if -- should be punished, as such, even if the
21 incitement failed to produce the expected result by the perpetrator.

22
23 At paragraph 419, the Chamber refers to the *Nahimana* judgement, paragraph 617, which is more or
24 less the same.

25
26 So, Mr. President, concerning the gravity of the crime, we believe that the Trial Chamber by providing --
27 imposing a 15-year sentence did not consider the gravity of the crime. Fifteen years is very little and
28 unreasonable.

29
30 And it is, furthermore, that the Trial Chamber, with regard to the responsibility -- and that's the other
31 element we need to take into account -- of the individual participation of the respondent, the Chamber
32 considered that the personal involvement of the Accused was clear.

33
34 At paragraph 267 to paragraph 281 of the judgement -- after a careful analysis of all the evidence
35 produced by the Respondent, as well as the Appellant, it considered, at paragraph 281 of the
36 judgement, basing itself on the convincing testimonies, according to it, that the Respondent was guilty
37 of these crimes, because towards the end of June 1994, we have only conclusions of the Chamber to

1 consider. It concluded that at the end of June 1994 Bikindi, in his convoy of *Interahamwe* on a vehicle
2 equipped with a loudspeaker, broadcast his songs. It concluded that on his way to Kayove, the
3 Respondent used a loudspeaker to invite the majority population of the Hutu to rise up and exterminate
4 the minority, the Tutsis.

5 *(Pages 39 to 61 by Sherri Knox)*

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

1 1510H

2 MS. FALL (*continuing*):

3 The Chamber concluded that when he was coming back from Kayove, the Respondent himself used
4 the loudspeaker to ask whether people had killed the Tutsis, who were referred to by him as snakes.

5
6 Mr. President, Your Honours, given this evidence, the Chamber concluded at paragraph 423 of the
7 judgement that the call launched by the Respondent to the majority people, "Rise up, go and look
8 everywhere, spare no one." And he spoke to them of -- he spoke about them of being snakes and
9 people in the minority. This is tantamount to calling for the extermination of the Tutsis, and it does not
10 show that the Trial Chamber did err in making such a ruling. Furthermore, Mr. President,
11 Your Honours, the Trial Chamber also provided who the -- the Respondent was, and under what
12 circumstances he was working.

13
14 So at paragraph 72, it was said that the Respondent was such an influential member of the MRND that
15 he approved the dissemination of anti-Tutsi propaganda by the MRND, and he personally participated
16 in the anti-Tutsi campaign.

17
18 And, on paragraphs 107 and 117, he was held in high esteem by the *Interahamwe* and considered to
19 be an important figure, and a man of authority in -- in the movement.

20
21 And at paragraph 83, it turns out that he participated in the composition of songs, so that these songs
22 be used with the particular intention -- intent to propagate the pro-Hutu ideology, and the anti-Tutsi
23 propaganda, and encourage them to ethnic hatred, in an atmosphere in increased ethnic hatred.

24
25 This is at paragraph 253, where the Chamber once again concluded that actions which inspired action,
26 and in particular stimulated the morale of the *Interahamwe*, who were looking for and were killing
27 Tutsis. This gives us the idea of an *Interahamwe* killer. If he was judged unreliable, the Chamber
28 nonetheless did find that we could rely on his testimony, and that the Bikindi songs had indeed inspired
29 action.

30
31 Mr. President, from paragraph 254, 255 and 256, in summary, that Bikindi, with his songs, manipulated
32 the history so that he could arrive at exalting solidarity of the Tutsi. The effect was to amplify the
33 genocide campaign. We did not say that he himself participated in the broadcasting of his songs, but
34 all these conclusions, these rulings of the Trial Chamber, demonstrate to us that the offence committed
35 by Bikindi at the end of June 1994 on the Kivumu-Kayove road, this direct and public incitement to
36 commit genocide is not an isolated fact, or a spontaneous one, for that matter. The Trial Chamber, by
37 its factual conclusions, provided us with a context concerning the criminal behaviour or conduct of the

1 Respondent. He used his influence, his position, and his authority to incite people to commit genocide.
2 And this is extremely serious.

3
4 Mr. President, we submit that the Trial Chamber, following its assessment of the gravity of the crime
5 committed by the Respondent, his principal and individual responsibility in the commission of that
6 crime, and by imposing a sentence of 15 years, did not comply with the rules which are so well known
7 of proportionality between the gravity of the offence and the degree of responsibility of the offender, as
8 established by the *Akayesu* appeal judgement at paragraph 414.

9
10 Mr. President, Your Honours, this takes me to the third criteria -- or, rather, the second criteria which I
11 intend to deal with, which is the taking into account of the personal circumstances with regard to the
12 assessment of the mitigating and aggravating circumstances.

13
14 In our brief, this is page 29 to 36.

15 MR. PRESIDENT:

16 Can I just stop you for a minute. This has nothing to do with your submissions, for which we are
17 grateful.

18
19 It's just that it's quite warm in here, and I'm enquiring from those with the knowledge whether the air
20 conditioning is working. You may continue.

21
22 It's working. I've been shown 18 degrees.

23
24 Yes, please -- oh, it's now at 16.

25
26 Yes. Please continue.

27 MS. FALL:

28 Thank you, Mr. President.

29 THE ENGLISH INTERPRETER:

30 Mr. President, may we also take the opportunity to request if the counsel can slow down a little for the
31 interpretation.

32 MR. PRESIDENT:

33 I am not sure whether you heard that. You're being asked to slow down in the interests of the
34 interpretation.

35 MS. FALL:

36 I would like to apologise to the interpreters.

37

1 Mr. President, I was saying that, in relation to all the factual findings made by the Trial Chamber with
2 regard to the personal circumstances of the accused person, it appears to me -- or, rather, we are
3 convinced that it did not take into account the aggravating and mitigating circumstances. You are the
4 only ones who are in a position to determine if, indeed, the Trial Chamber took this into account.

5
6 All we want to say here, and draw your attention to this fact, is that in paragraph 451, the aggravating
7 circumstances were taken into -- were referred to by -- it said that the Respond -- the accused person's
8 abused his position, in relation -- that is all we can say now.

9
10 And we also want to draw your attention to the fact that, as far as we are concerned, there is an
11 aggravating circumstance, factor, that the Trial Chamber did not take into account. And we are, indeed,
12 surprised that the Trial Chamber did not take this into account. Mr. President, the Trial Chamber did
13 not take into account the fact that the accused person knew what was happening in Rwanda even while
14 he was outside the country, or was not present during the events of 1994. That is what comes out
15 clearly from his cross-examination, when he says that news that got to him was to the effect that the
16 country has -- was in chaos. And that is from transcripts of 5th November 2007.

17
18 Mr. President, what did he do? Did he use his influence, his authority, as the Trial Chamber said, to
19 come back and attempt to bring back peace because he was an influential person? That is not what he
20 did. He came back and wanted to participate personally in the genocide. He wanted to contribute to
21 the genocide, and this is a mitigating circumstance that needs to be proved beyond reasonable doubt.
22 This is obvious. And the Trial Chamber ought to have taken this into account to determine his
23 culpability.

24
25 Mr. President, we do not understand this sentencing to 15 years, only 15 years of imprisonment, taking
26 into account the degree of participation of the accused person and the role he played. It's also very
27 surprising that the Trial Chamber -- I don't want to come back to this, because my colleague,
28 Florida Kabasinga, this morning developed this aspect. It's after carefully examining the fact that there
29 is -- there were no mitigating factors that he could benefit from, Mr. President, Your Honours. The
30 decision of the Trial Chamber does not conform to the principles.

31
32 These are just elements that we want to bring to your attention, that the Chamber, on account of the
33 gravity of the crime, even -- even if there were mitigating circumstances, that there were situations that
34 accused persons were sentenced to life. Let me give, for example, the *Niyitegeka* appeal judgement,
35 and it's paragraph 267 there. We're saying, once again, that the Trial Chamber abused of his power --
36 abuses his powers by imposing a sentence of 15 years for such a serious crime committed by the
37 accused persons, in the absence of all mitigating circumstances.

1 That takes us, Mr. President, to the fact that -- to the third factor, that the Trial Chamber did not take
2 into account -- or, sufficiently take into account the sentence frame in practice in Rwanda. We are not
3 saying, Mr. President, that the accused person ought to have been tried on the basis of Rwandan law of
4 1978. We are talking about genocide, and there is an organic law, 0873. One can say that they
5 referred to this organic law, and it is the organic law which says that the law -- that the sentence is life
6 imprisonment for genocide. Life imprisonment.

7
8 Mr. President, Your Honours, it is true that Rule 23(1) of the Statute provides that the Chamber shall
9 refer to the practice -- to the sentencing practices in Rwanda. That is also confirmed by Rule 101. But
10 we also say that these are general rules, and it is your jurisprudence that interprets these rules and tells
11 us how to apply them. It is your jurisprudence that tells us how to apply these general rules.

12
13 In the *Serushago* judgement, the Appeals Chamber indicated that the Trial Chamber, in its
14 application -- that the Trial Chamber is not under obligation -- or, is not bound by these practices. But,
15 to take them into account further, Mr. President, Your Honours, *Semanza*, a judgement referring also to
16 *Nikovic* judgement, paragraph 69, states that the Trial Chamber should explain the sentence that is
17 imposed, and indeed -- and to explain if they deviate from the limits imposed by this frame. One should
18 refer to *Semanza's* judgement, paragraph 377, to see if indeed they respected this rule.

19
20 In paragraph 447, as I said, it simply noted that, in the Rwandan laws, genocide is punishable by life
21 imprisonment, or life imprisonment with special conditions. They did not indicate. As the
22 *Semanza* decision stated in paragraph 680, that, to determine the appropriate sentence, they had to
23 take into account careful consideration of relevant factors, general, as well as individual. Mr. President,
24 the Trial Chamber did not explain its decision regarding the fact that led it to overlook this sentencing
25 practice -- practices that led it to impose such an indulgent sentence. Mr. President, Your Honours,
26 the -- they did not respect the combination of the effect of these two articles.

27
28 There are two issues, two further issues. Whether the Trial Chamber did take into account the
29 practices of your Chamber. They said, yes, they did refer to the *Kajelijeli* appeal judgement. *Kajelijeli*
30 and *Ruggiu*. And we understand -- we easily understand why, because it is in those two cases that the
31 sentences were 12 to 15 years' imprisonment. But, Mr. President, we believe that we may be able to
32 put before you a wider range of decisions. We could, for example, refer to the *Kambanda* case, the
33 *Akayesu* case, *Niyitegeka*, *Nahimana*, *Kalimanzira*, the *Media* case.

34
35 And, Mr. President, you will have the latitude to verify for yourselves what the practices are in this
36 Tribunal. Because, for such serious cases, the sentence is between 30 to -- 30 years to life
37 imprisonment. And here we would like to submit this to you to -- to determine whether the

1 Trial Chamber respected a principle applicable in this manner.

2
3 Mr. President, I would like to conclude. I don't want to dwell too much on this; everything is in our brief.
4 And I just want to bring these general principles to your knowledge.

5
6 Let me conclude by saying, Mr. President, Your Honours, that the Trial Chamber rendered this
7 decision, which we rendered to be inappropriate for the reasons outlined above, did not keep in mind
8 the objective of sentence. However, in paragraph 443 of the judgement, it says the sentence has to
9 take into account retribution, the principles of retribution and others. In *Nahimana*, in paragraph -- in
10 *Nahimana* and *Stakic*. We do not think that for such a serious offence, and with the obvious
11 participation of the accused person as principal perpetrator, we do not believe that 15 years is
12 sufficient.

13
14 Your Appeals Chamber will have taken into account the importance of the situation -- the fact of the
15 situation in arriving at the appropriate sentence. Explain that they -- this important factor of this
16 situation, while being true, but in paragraph 105 of the *Aleksovski* appeals judgement, it states that it is
17 also important, the -- the persuasive effect of sentencing.

18
19 This horror, it should also have a dissuasive effect. The International Tribunal should clearly indicate
20 the international community condemns the conduct in question and it is no longer ready to tolerate such
21 serious violations of international humanitarian law and international -- and humanitarian laws.

22
23 In *Kordic and Cerkez*, this principle was strengthened by the Appeals Chamber of the
24 International Criminal Tribunal for the former Yugoslavia, and I quote: "One of the objective -- principal
25 objectives of sentences pronounced by the International Criminal Tribunal is to clearly make the point
26 that nobody can act with impunity in the face of international justice."

27
28 Mr. President, Your Honours, I think the fact of imposing a sentence of 15 years to the Accused for a
29 crime which is so serious and analogous to the crime of crimes is appropriate. And we request you,
30 Mr. President, that in relation to this failure to respect the principles established by the law, to declare,
31 to find -- and we request that the sentence of Bikindi be revised and that he be sentenced to -- that he
32 be given a sentence which will not be less than 30 years.

33
34 We are confident, Mr. President, because we also know that, beyond this, you will render a decision,
35 but a decision that is fair.

36
37 If you will allow me, Mr. President, to say and to assert that it is not fair that the accused person which

1 was -- who was found by the Trial Chamber to be a great artiste, who has the gift of electrifying crowds,
2 to be able to train *Interahamwe*, and did not get the population -- or, got the population to go after
3 people and not to spare any person. Mr. President, we are surprised that this person was given a
4 sentence of only 15 years.

5
6 It is further not fair that a person who was not in Rwanda, who was outside the country, wanted to come
7 back to the country to participate himself in the crime of crimes.

8
9 Mr. President, you'll render a fair -- you will impose a fair sentence by imposing a sentence of life
10 imprisonment, or an imprisonment which will not be less than 30 years, and that will be justice done. I
11 thank you.

12 MR. PRESIDENT:

13 Thank you, Ms. Fall. You present your case with such passion that I'm sure Mr. O'Shea will soon be
14 asking you to join him in his next jury trial in London. And perhaps he'll ask you to make the closing
15 address to the jury. But we are grateful for your submissions.

16
17 Mr. O'Shea.

18 MR. O'SHEA:

19 Yes, thank you, Mr. President. Thank you, Ms. Fall.

20
21 Let me, as it were, go backwards and start from the end. I want to clarify this issue of Mr. Bikindi
22 coming back to Rwanda. The Prosecution did not provide any evidence as to why Mr. Bikindi came
23 back to Rwanda, but Mr. Bikindi did. Mr. Bikindi explained that his young daughter, Anita, had been
24 injured by a bomb, and that this was his motivation for coming back to Rwanda. That evidence
25 remained unchallenged, and there was no evidence to the contrary from the Prosecution as to why in
26 fact he came back. So, I don't believe that that can be held against him.

27
28 My learned friend asked why he did not use his authority to help when he came back. Well, first of all, it
29 was not found that he had any authority. It was only found that it was perceived that he was an
30 influential member of the MRND, and that he -- it was perceived that he had influence within the
31 *Interahamwe*.

32
33 The Defence evidence does in fact demonstrate that, within the two-week period or so that Mr. Bikindi
34 was in Rwanda, in Gisenyi, he assisted the Tutsis that he could. There was evidence from no less than
35 eight Tutsis with respect to Mr. Bikindi's activities, how he assisted them, before, during, and after the
36 genocide. Those people included DUC, DZS, QT, Mukabanana, XVBR, CQR, AQH, and DQR. And all
37 of those Tutsi witnesses came to Court and described how Bikindi had excellent relationships with

1 Tutsi, how he assisted Tutsi, and much of that evidence was effectively unchallenged or undamaged.

2
3 It was described how his domestic servant was Tutsi, how he brought up a young Tutsi and who
4 became a member of his ballet and lived with him and who considered him like a father, how he helped
5 a young orphan and took that young orphan in exile with him. Some dispute over whether he knew that
6 she was Tutsi. But whether she was Tutsi or Hutu, she was an orphan.

7
8 So it's not as if Mr. Bikindi just stood back and did nothing. He stayed at home, he was a musician. If
9 it's been found that he was an influential member of the MRND and had influence within the
10 *Interahamwe*, that has to be looked at in the context of the evidence used to support that finding. It was
11 not established that he held any official position in these organisations. We are just dealing with
12 influence, if it's there. And, as we know, the -- the evidence relied upon was the 1993 Kivumu meeting,
13 which has been a matter of contention here today; the meeting in the video, which has been a matter of
14 contention today; the evidence of BGH --

15 MR. PRESIDENT:

16 Mr. O'Shea.

17 MR. O'SHEA:

18 Yes.

19 MR. PRESIDENT:

20 Let me take you back to what you said, I didn't quite understand it.

21 MR. O'SHEA:

22 Yes.

23 MR. PRESIDENT:

24 You said that if it is found that he had influence in the MRND, that has to be looked at in light of the
25 evidence supporting that finding. Or if it is found by who?

26 MR. O'SHEA:

27 By the Trial Chamber. The Trial Chamber did find that Mr. Bikindi did have, or was perceived to have --

28 MR. PRESIDENT:

29 If it is found by the Trial Chamber --

30 MR. O'SHEA:

31 Yes.

32 MR. PRESIDENT:

33 -- and that finding is not overturned by the Appeals Chamber --

34 MR. O'SHEA:

35 Yes.

36 MR. PRESIDENT:

37 -- then it's a finding.

1 MR. O'SHEA:

2 I entirely accept that. This is the Prosecution's appeal, and they're saying that the gravity of this offence
3 must be looked at in the light of the fact that Bikindi did not do what he could have done to help people
4 when he came back to Rwanda. So what I'm saying is that that has to be looked at in the context of
5 that -- in the context of that finding of perceived influence. What was the measure of that perceived
6 influence? The measure of that perceived influence was not discussed by the Trial Chamber in the
7 sentencing.

8 MR. PRESIDENT:

9 Now I understand you, the measure of the influence.

10 MR. O'SHEA:

11 Yes, yes. Because the Trial Chamber does in fact state what it relies upon in order to reach that
12 finding. And if one looks at those strands of evidence, even if those strands of evidence are accepted,
13 this is not a man who wields great influence such that he can come back to Rwanda and make big
14 changes. And what he claims he did, which was to stay at home, would be understandable, even within
15 the context of that perceived influence. The evidence of BGH was one of the parts of the evidence the
16 Trial Chamber relied upon for that finding. And BGH said, "Well, I saw Mr. Bikindi on several occasions
17 having discussions with well-known MRND politicians, but I didn't hear what they said."

18
19 Another strand of the evidence, in fact, one of the few strands of the evidence left in this discussion,
20 was a speech by Mr. Karemera, where he praises Mr. Bikindi for his words of advice. But that, again,
21 has to be looked at in the context of the fact that this man is a singer. So -- so those elements of
22 evidence, taken at their highest, accepting the Trial Chamber's finding, do not demonstrate that this
23 was a man who had power or authority or influence such that he could make changes in Rwanda when
24 he got back for the benefit of his daughter. That's my point.

25 MR. PRESIDENT:

26 Yes, I understand now.

27 MR. O'SHEA:

28 Yes, thank you.

29

30 Now, the other matter which my learned friend referred to -- and, again, Mr. President, I'm here
31 revolving around the question of gravity, because it's my understanding of my learned friend's
32 submission that the Trial Chamber's misunderstood the gravity of this offence in the individual
33 circumstances of this case.

34

35 One of the other principles that my learned friend referred to was the fact that Mr. Bikindi was the
36 principal offender. Now, again, that must be looked at in its context. If the crime is direct and public
37 incitement, in one sense you are always the principal offender of that crime, because you are the one

1 who is uttering the words. Can that expression, "principal offender", be taken in a broader -- in any
2 broader sense?

3
4 And here I refer Your Honours to the evidence of AKJ at page 6, lines 29 and 30. During the -- during
5 the evidence of AKJ, he -- he states: "Thank you, Madam President. He spoke at the end of his
6 statement. As a matter of fact, he did not sing. The music was played that came from a cassette. He
7 did not sing himself. His statement was a speech delivered in much the same capacity as the other
8 speakers had done." Now, that was -- we always, unfortunately, come back to the confusion about
9 dates. But that was explained in the context of a discussion about the incident of the journey to
10 Kayove *commune*, where the witness said, I believe it was in the month of June 1994. And that's just a
11 few lines down from there. So the word "speech" may not be an appropriate expression.

12
13 But the point being made there by AKJ is that Bikindi is not the only one who said things. So if we're
14 looking at "principal" in that broader context, we need to take that -- take that into account. There's
15 no -- it wasn't established that Bikindi was the leader of that convoy. It wasn't established that he was
16 the man with the most influence. In fact, there was evidence that he had military in the vehicle with him.

17
18 If I may, I'd like to come briefly to -- again, still on the issue of gravity, to the point which both the
19 Prosecution and myself have made about the fact that the crime itself is the words when you're
20 coming -- when you're dealing with direct and public incitement. And I would invite the
21 Appeals Chamber to be cautious about the submissions of the Prosecution, and some of their citations
22 to jurisprudence, in the sense that one must carefully distinguish between the analysis required for
23 conviction and the analysis required for sentence. For example, all of these passionate expressions
24 about the words used by Bikindi and what he was saying, essentially, first and foremost, go to the crime
25 itself, because this is direct and public incitement to genocide.

26
27 Now, let me -- let me now come to the issue of the songs. Because the songs hasn't played a large
28 part in this appeal, somewhat ironically, because Bikindi was initially arrested on the basis of his songs.
29 And initially, at any rate, in the early days, that was the basis of his being brought here. But somehow
30 or other the songs have kind of dissipated into the atmosphere. The Prosecution tries to resurrect them
31 now. Bikindi wasn't convicted of them, but the Trial Chamber did find that they were hate speech on
32 the basis that there was no other reasonable conclusion than that Bikindi must have been trying to
33 incite racial hatred.

34
35 The Trial Chamber also stated that these songs were used by journalists in 1994. However, it was not
36 established that Bikindi knew about that or that he could do anything about it. It was not established
37 that, in the public speaker incident, the specific songs which were the subject of the trial were in fact the

1 songs played on this journey to Kayove.

2
3 It was accepted by the Trial Chamber, at paragraph 248, that the songs were historically accurate. And
4 let me be accurate. What the Trial Chamber actually said was: "Although the historical references in
5 the songs were accurate, the Chamber notes the context in which Bikindi referred to them." So that
6 also has to be taken into the balance, if one is looking at the songs. A man who produces a text or a
7 song or a documentary, or whatever the case may be, which is accepted as historically accurate, is a
8 very different situation from a man who is gratuitously spouting out racial hatred on the basis of falsities.

9
10 And these particular songs, which were described by the Prosecution and the Trial Chamber as
11 *Nanga abahutu*, *Bene sabahinzi* were explained by the Defence and, in particular, by Mr. Bikindi.
12 There's one line in the Tribunal's translation of the song *Bene sabahinzi* where it even says, "No one
13 chooses to be a Hutu, a Twa, or a Tutsi." So these were songs which were difficult to interpret.
14 Experts came to court, from the Prosecution and the Defence, to interpret these songs. The
15 Trial Chamber accepted that it was possible to interpret the songs differently, but made their findings on
16 the basis of the context.

17
18 So that -- and, furthermore, the Defence produced evidence through Mr. Bikindi that when he, for
19 example, composed the song "I hate the Hutu", that was in the context of bombs being used in 1992
20 and 1993 between political parties who were run by Hutus. That part of the context in Rwanda in 1992
21 and 1993 was not taken into account by the Chamber, and we say that was an error. And even their
22 finding of hate speech cannot stand. But even if the finding of hate speech does stand, it has to be
23 looked at in its proper context, and it certainly cannot constitute any aggravation or relevance to the
24 determination of the gravity of what he did in 1994.

25
26 And I think I've gone on too long. Thank you very much.

27 MR. PRESIDENT:

28 Yes, Judge Liu.

29 JUDGE LIU:

30 Yes, Counsel, I have a question which I would like you to invite me. That is, in your jurisdiction, and
31 according to the jurisprudence in your jurisdiction, the incitement to genocide itself is a crime, or is a
32 form of the participation in the crime. Which also means that those who commit it are convicted as the
33 incitement to the genocide is the principal of the crime or accessory to the crime of genocide.

34 Thank you.

35 MR. O'SHEA:

36 Thank you, Your Honour. In my jurisdiction, as things stand at the moment, as far as I'm aware, the
37 crime of direct and public incitement to commit genocide has not been -- yet been incorporated into the

1 law.

2 JUDGE LIU:

3 Well, I believe that, you know, UK is a party of the -- the statutes of International Criminal Court, which
4 you enacted as your domestic law in 2001 --

5 MR. O'SHEA:

6 Yes.

7 JUDGE LIU:

8 -- I believe. So it's part of UK law, I believe.

9 MR. O'SHEA:

10 Yes. Then I stand corrected. What I do know is there is an attempt to change the law at the moment in
11 order to ensure that certain Rwandans who could not be extradited from the United Kingdom can in fact
12 be tried in the United Kingdom. So it may be that Your Honour is right, and that the obstacles are more
13 technical than I thought.

14

15 But, what I can -- what I can -- I -- what I can say is that my understanding is that the law in the
16 United Kingdom is not too different from the law of this Tribunal, insofar as incitement and -- incitement
17 and participation is concerned. In the sense that, I believe -- and I haven't had a chance to look at this,
18 but I believe that incitement is an inchoate offence. So the offence is the -- the utterings of the words,
19 as I've said, rather than the consequence of uttering those words. However, you can be a participate --
20 an accessory to a crime. And if, for example, the crime is genocide, or, shall we say murder, then you
21 can instigate the commission of that crime by making a statement. And in English law, we would
22 normally classify that as an aider and abettor.

23

24 We're not dealing with an aider and abettor situation here. We're dealing with a word crime. If we were
25 dealing with an aider and abettor situation, then we would have to establish that the crime was
26 completed. And once we'd established that, we would have to look at all of those circumstances, and
27 the consequences of the statement which had been made in terms of people's deaths and how they
28 died, in order to determine sentence. But here we're dealing with what's effectively 60 seconds -- or,
29 maybe about 60 seconds of speech, at least in terms of what's been proved. And that's what the
30 Trial Chamber was sentencing on.

31

32 The Prosecution have appealed, but I -- I don't believe that they can appeal with much conviction. I
33 can't -- I cannot see, myself, how it could possibly be fair to say that a man who has made
34 two statements on one day, no matter how atrocious those statements, and the consequences have not
35 been proven to have followed, how that could possibly deserve a sentence of 30 years to life. And, as
36 we submitted this morning, in our submission, the Trial Chamber has in fact gone outside its
37 discretionary framework.

1 Where does that discretionary frame -- where are the boundaries of that discretionary framework?
2 Well, let's not -- let's not lose sight of what 15 years of a man's life actually is. It's an enormous chunk
3 of a man's life, particularly this man at his age. And the question is, does he deserve such a hefty
4 sentence as 15 years in such circumstances? The idea that this Appeals Chamber should overturn the
5 Trial Chamber's decision and sentence Mr. Bikindi to life imprisonment for that day of folly is, in my
6 submission, outrageous.

7
8 I know I haven't actually answered Your Honour's question. Although I am an English barrister, I'm
9 perhaps not qualified to do so.

10 JUDGE LIU:

11 Thank you.

12 MR. PRESIDENT:

13 Yes, Judge Meron.

14 JUDGE MERON:

15 Counsel, even if we were to say that the direct and public incitement ought to carry a lesser sentence
16 than genocide, how can you justify your contention that this mandates a sentence of less than 15 years,
17 when the crime of genocide can be punished up to life imprisonment?

18 MR. O'SHEA:

19 Well, I've tried -- I've tried to answer that question already, in a sense, when I just spoke. Because, in
20 my submission, the crux of this case is that we are in fact just dealing with a series of words which were
21 spoken, for whatever reason. And no matter how bad those words are, that's what we're dealing with.
22 And on one day, and on one journey.

23
24 We have scenarios in this genocide, the 1994 genocide in Rwanda, where people were active from the
25 6th of April until the end of July, persistently trying to ensure the destruction of the Tutsi population.
26 That's a three-and-a-half-month period of determined effort which came to fruition in the massacre of, in
27 the case of some Accused before this Court, thousands. So it is understandable that genocide carries
28 a life sentence. It's understandable that certain cases of direct and public incitement could conceivably
29 lead to very high sentences. I don't know how high; it would depend on the facts.

30
31 But, on the facts of this particular case, can it really be just -- can it really be a deserving punishment for
32 this man to spend most, if not all, of the rest of his life in prison? The divergence between the facts of
33 this case and the facts of other cases is, in my submission, vast. And that is why the documents that
34 we have brought to the attention of Your Honours, both my analysis of the Rwandan laws and the
35 national provisions, are, in my submissions, of a persuasive nature.

36 JUDGE MERON:

37 Thank you, Counsel.

1 MR. PRESIDENT:

2 Mr. O'Shea, have you concluded?

3 MR. O'SHEA:

4 Oh, yes, Mr. President. I was awaiting any other questions.

5 MR. PRESIDENT:

6 No other questions.

7 MR. O'SHEA:

8 Thank you.

9 MR. PRESIDENT:

10 Thank you very much.

11

12 Is there any reply, Ms. Fall?

13 MS. FALL:

14 Mr. President, I think that I will merely stick to the submissions that I have already made, and I shall
15 have no further reply.

16 MR. PRESIDENT:

17 You are resting on your submissions.

18

19 Well, in that case, I have to inform Mr. Bikindi -- Mr. Bikindi, that you have an opportunity now to make a
20 statement. If you wish to, you may make a statement.

21 *(Pages 62 to 74 by Kirstin McLean)*

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

1 1600H

2 THE APPELLANT:

3 Thank you, Mr. President. Your Honours. My statement is quite simple. The tragic events that
4 occurred in Rwanda constitute an unspeakable tragedy. Tragic events that will leave you stunned,
5 a real tragedy. Let us pray that never again will they happen. Never again will they occur. Oh, my
6 people, never again. Never, never, never ever again.

7
8 Were I again to have the opportunity to sing -- to sing for Rwandans, I would go to the country of a
9 thousand hills so that all Rwandans can hear me. I would climb right up to the highest peaks. And
10 once at the pinnacle, I would lodge my appeal. I would invite the Rwandans, Hutu, Twa and Tutsi alike.
11 I would remind them that the tragic events that occurred in Rwanda had injured the hearts of all of us. I
12 would invite them to sing in unison. The tragic events that occurred in Rwanda constitute an
13 unspeakable tragedy, tragic events that would leave you stunned, a real tragedy.

14
15 Let us pray that never again will they happen. Never again will they occur. Oh, my people, never
16 again. Never, ever, ever, ever again.

17
18 Then will come the political leaders and the ordinary citizens, surges. Experienced and honest men will
19 also be invited there. To come, too, will be specialists of the Rwandan history so they can do a
20 thorough analysis. Present also at the appointed hour will be our experts in the socio-economic field.
21 They will come together to identify the real causes of our misfortunes and make proposals for a final
22 solution to the endemic tragedies among Rwandans. All this with a single objective for everyone, the
23 reconstruction of Rwanda so that she becomes a nation spared of wars, killings and tears. A nation in
24 which Tutsis, Twa and Hutu will together live in peace like brothers without tearing each other apart.
25 I will seize the opportunity to remind Rwandans that Rwanda is the home of three ethnic groups, Hutu,
26 Twa and Tutsis. And no one chooses to be born Hutu, Tutsi or a Twa. No one pays to be born
27 Rwandan. The Mutwa is a Rwandan Twa; the Muhutu is a Rwandan Hutu; the Mututsi is a Rwandan
28 Tutsi. No one can change that. We must all understand and always bear in mind that no one should
29 be a victim of his ethnicity or have to live as an outcast because of it. Above all, the most important
30 thing is the acceptance of the other person and the respect of his individual integrity. Respect for their
31 rights and freedoms throughout the national territory.

32
33 Dear fellow citizens, be careful, division is only of benefit to others. It is forbidden, dear fellow citizens.
34 It is against our culture to remind someone of painful events. To the contrary, Rwandan culture teaches
35 us that victims of the same misfortune try to support and console one another. Faced with the same
36 misfortune, they provisionally set aside their quarrels. They close ranks without bitterness so they can
37 better understand the truth and make it see the light of day. The innocent proved innocent, pardon is at

1 last given and the guilty are punished. Thus, these exchanges based on truth, mutual respect and
2 understanding firmly cement reconciliation. That's a Rwandan.

3
4 I invite you to observe a brief moment of silence so that all together we can honour the memory of all
5 those innocent victims so savagely killed. And we shall close by singing in unison.

6
7 The tragic events that occurred in Rwanda constitute an unspeakable tragedy, tragic events that will
8 leave you stunned, a real tragedy.

9
10 Let us pray that never again will they happen. Never again will they occur. Oh, my people, never
11 again. Never ever, ever, ever again.

12
13 Thank you very much, Your Honours, for having given me this opportunity.

14 MADAM PRESIDENT:

15 Thank you, Mr. Bikindi.

16
17 That ends the hearing. We are adjourned.

18 *(Court adjourned at 1605H)*

19 *(Pages 75 to 76 by Sithembiso Moyo)*

20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

CERTIFICATE

We, Sithembiso Moyo, Janice Dickman, Sherri Knox and Kirstin McLean, Official Court Reporters for the International Criminal Tribunal for Rwanda, do hereby certify that the foregoing proceedings in the above-entitled cause were taken at the time and place as stated; that it was taken in shorthand (*stenotype*) and thereafter transcribed by computer; that the foregoing pages contain a true and correct transcription of said proceedings to the best of our ability and understanding.

We further certify that we are not of counsel nor related to any of the parties to this cause and that we are in nowise interested in the result of said cause.

Sithembiso Moyo

Janice Dickman

Sherri Knox

Kirstin McLean