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UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(34787- 34775)

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 23 April 2007

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION RECONSIDERING EXCLUSION OF EVIDENCE RELATED TO ACCUSED KABILIGI

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Kartik Murukutla

The Defence
Raphaël Constant
Allison Turner
Paul Skolnik
Frédéric Hivon
Peter Erlinder
Marc Nerenberg
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the "Kabiligi Motion for Reconsideration" etc. of the Trial Chamber's Decision of 18 September 2006, filed on 26 October 2006; the Prosecution response, filed on 30 October 2006; and the Defence reply, filed on 7 November 2006;

NOTING the Appeals Chamber "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", rendered on 18 September 2006;

HEREBY RECONSIDERS its earlier decision.

INTRODUCTION

1. On 19 October 2004, the Kabiligi Defence filed a motion to exclude portions of the testimonies of eight Prosecution witnesses, claiming that they testified about allegations which are not mentioned in the Indictment.[1] On 27 September 2005, the Chamber excluded portions of the testimonies given by two witnesses.[2] The Defence filed a second exclusion motion, on 5 April 2006, essentially asking the Chamber to reconsider its previous decision. On 4 September 2006, the Chamber decided to exclude a portion of one witness's testimony.[3] In light of a decision rendered by the Appeals Chamber on 18 September 2006 ("Appeals Chamber Decision"), the present motion asks the Chamber to reconsider its decision of 4 September 2006.[4]

2. In its decision, which relates to exclusion of evidence, the Appeals Chamber found that the Trial Chamber had failed to consider whether the defects in the Indictment which had been cured by the Prosecution nonetheless prejudiced the right of the Accused Ntabakuze to a fair trial by hindering the preparation of a proper defence.[5] Second, the Appeals Chamber instructed the Trial Chamber to reconsider whether the burden of proof had been appropriately placed on the Defence in instances where the Defence had not made a contemporaneous objection concerning lack of notice to the evidence at the time it was introduced.[6]

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[1] Kabiligi Defence's « Requête en extrême urgence aux fins de rejet des témoignages sur des faits qui ne figurent pas dans l'acte d'accusation », filed on 19 October 2004 (challenging evidence by Witnesses XAI, ZF, XXY, XXH, LAI, XXQ, DCH, and AAA).

[2] *Bagosora et al.*, Decision on Exclusion of Testimony outside the Scope of the Indictment (TC), 27 September 2005, paras. 10, 16 (excluding portions of Witnesses XAI and DCH) ("27 September 2005 Decision").

[3] *Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 18 (excluding a portion of Witness XXH's testimony) ("4 September 2006 Decision").

[4] Kabiligi Motion for Reconsideration of the Trial Chamber's 'Decision on Kabiligi Motion for Exclusion of Evidence' in light of the Appeals Chamber Decision of 18 September 2006, filed on 26 October 2006.

[5] *Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 26.

[6] Appeals Chamber Decision, paras. 45-47.

DELIBERATIONS

(i) General Remarks

3. Reconsideration is an exceptional measure, available only in particular circumstances.[7] The Appeals Chamber's ruling with regard to the cumulative effect of cured defects in the Indictment constitutes a new circumstance which has arisen since the Trial Chamber's decision of 4 September 2006, and which may affect it. The Chamber therefore finds that reconsideration is justified. The Defence request for reconsideration is made on the basis of the curing issue, but the Chamber will also consider the Defence burden of proof in the light of the Appeals Chamber's decision.

4. Some of the evidence which is contested by the Defence in its present motion was not challenged in its exclusion motions of 19 October 2004 and 5 April 2006 ("Defence exclusion motions"), and hence not addressed in the Chamber's decision of 4 September 2006. A motion for reconsideration should normally address issues considered in the challenged decision. However, the Appeals Chamber's subsequent decision warrants the Chamber's consideration of the totality of the Defence submissions in the present motion.

5. The Defence argues that 29 allegations have been made against the Accused and that 21 of them fall outside the scope of the Indictment and Bill of Particulars and have required "curing" by the Prosecution. Without necessarily agreeing with this assertion, the Chamber recalls that, in its exclusion decisions of 27 September 2005 and 4 September 2006, it has already been seized with 14 of these allegations, whereas seven were not raised in the Defence exclusion motions leading to these two decisions.[8]

6. Of the 14 allegations, one was excluded.[9] In respect of four, the burden was placed on the Defence to show prejudice. The Chamber found that the burden was not met.[10] In relation to nine allegations, the Chamber found that the Defence had sufficient notice.

(ii) Burden of Proof

7. In relation to the four of the 14 allegations where the Chamber found that the Defence did not meet its burden of proof, the Chamber declined to exclude the evidence. In light of the Appeals Chamber Decision, the Trial Chamber must reassess its findings concerning these four allegations.

8. The Appeals Chamber summarized the legal situation as follows:

> 45. Accordingly, when an objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine

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[7] *See e.g. Bagosora et al.*, Decision on Prosecutor's second motion for reconsideration of the Trial Chamber's "Decision on Prosecutor's motion for leave to vary the witness list pursuant to Rule 73 *Bis* (E)" (TC), 14 July 2004, para. 7.

[8] Some of these seven allegations have been challenged through other motions, which were decided by the Trial Chamber before the Appeals Chamber Decision.

[9] 4 September 2006 Decision, excluding the allegation by Witness XXH's that Kabiligi shot a person at the Rusizi 1 roadblock in Cyangugu, in May 1994 (para. 18).

[10] There was a fifth allegation in respect of which the Chamber placed the burden on the Defence but nonetheless examined the issue of notice and concluded that it was provided. This was the allegation by Witness ZF that the Accused was a member of the "zero network" and the Dragons.

whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused's ability to defend himself has been materially impaired. In doing so, the Trial Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter.

46. In summary, objections based on lack of notice should be specific and timely. The Appeals Chamber agrees with the Prosecution that blanket objections that "the entire indictment is defective" are insufficiently specific. As to timeliness, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced. However, an objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial.

47. The Appeals Chamber finds that the statements made by the Trial Chamber at paragraph 7 of the Impugned Decision must be corrected to the extent explained above. As a consequence, the Trial Chamber should reconsider the Impugned Decision on this basis. This reconsideration will be limited to the instances where the Trial Chamber found that the objection had not been raised at the time the evidence was introduced and therefore concluded that the burden of proof had shifted to the Defence.

(a) The Accused's Statement at Gisenyi Hospital about Tutsis

9. Witness XAI testified that the Accused met Colonel Anatole Nsengiyumva in the Gisenyi Hospital on or around 4 July 1994 and said to the sick soldiers that there were still Tutsis in the Kibuye and Bisesero regions who should be prevented from receiving fresh supplies.[11] This allegation was not contemporaneously objected to during the trial. It was first challenged by the Defence in its exclusion motion of 5 April 2006, but the Chamber's decision of 4 September 2006 did not specifically address the allegation.[12]

10. At the commencement of Witness XAI's testimony, the Defence objected generally to the late notice it received to some of the facts about which the witness was about to testify.[13] During the examination-in-chief, the Defence raised several objections based on the novelty of the information presented by the witness.[14] However, there was no contemporaneous objection by the Defence when the witness testified about Kabiligi's alleged statements at Gisenyi Hospital. Counsel for Kabiligi crossed-examined the witness that day on this issue.[15] He later reserved the right to conduct further cross-examination in relation to newly discovered information.[16] No further challenge of this allegation was raised until the Defence exclusion motion of 5 April 2006.

11. In light of the very late stage of the trial in which this objection was raised, the Chamber maintains its position that the burden has shifted to the Defence to establish that it

[11] T. 9 September 2003 pp. 13-15.
[12] That motion was regarded as a request to reconsider the Chamber's 27 September 2005 Decision, and since in the motion leading to the 27 September 2005 Decision the allegation in question was not challenged, the Chamber's 4 September 2006 Decision did not specifically address the allegation. It is noted that in its exclusion motion of 19 October 2004, the Defence challenged several portions of Witness XAI's testimony, but not the portion containing the allegation in question.
[13] T. 8 September 2003 p. 1.
[14] *See e.g.* 9 September 2003 pp. 9, 12.
[15] T. 9 September 2003 pp. 46-47; T. 10 September 2003 pp. 3-4.
[16] T. 10 September 2003 pp. 9-10.

suffered prejudice from the lack of notice. This burden has not been met.

(b) The Accused's Arrival in Bugarama to Distribute Weapons

12. Witness LAI testified that on 28 January 1994, the Accused arrived by helicopter in Bugarama Commune, Cyangugu prefecture, to distribute weapons to *Interahamwe*, and told them that "the enemy was the Tutsi".[17] This allegation was challenged by the Defence in its exclusion motions of 19 October 2004 and of 5 April 2006. In its decision of 27 September 2005, the Chamber found no record of a contemporaneous objection to the allegation. It concluded that therefore the burden of proof lied with the Defence and found that the Defence had not met the burden.[18] The Chamber's decision of 4 September 2006 did not specifically address this allegation.[19]

13. At the beginning of Witness LAI's testimony, the Defence indicated that it had objections to some of the evidence to be presented by the witness, but not to the event in Bugarama.[20] During the examination-in-chief (but not immediately after the witness addressed this event), the Defence indicated that some information proffered by the witness did not appear in his prior statements without specifically referring to this incident. In fact, the Defence explicitly stated that its general statement was not an objection to the testimony.[21] The Defence cross-examined the witness on the allegation in question.[22] Its first challenge to the Bugarama allegation was in its exclusion motion of 19 October 2004, five months after the testimony.

14. In light of the Defence lack of contemporaneous objection and late subsequent challenge of the evidence, the Chamber considers that the burden has shifted to the Defence to establish that it suffered prejudice from the lack of notice. This burden has not been met.

(c) Reprimand of Soldier in Cyangugu for not Killing Tutsi;
(d) Order to Soldiers to Prevent Supplies to Tutsi refugees

15. Witness XXY testified that the Accused reprimanded a soldier in Cyangugu who did not assist the Interahamwe in attacking and killing Tutsi refugees in two refugee camps in August 1994.[23] He also stated that the Accused ordered soldiers to prevent trucks of Operation Turquoise from providing supplies to the Tutsi refugees in Bisesero on 4 July 1994.[24] These allegations were challenged by the Defence in its exclusion motion of 19 October 2004, and later articulated more clearly in its exclusion motion of 5 April 2006. In its decision of 27 September 2005, the Chamber found no record of contemporaneous objections to the allegations, and concluded that the Defence had the burden to establish that it had been prejudiced. It found that the Defence had not met the burden.[25] In its decision of 4 September

[17] T. 31 May 2004 p. 15.
[18] 27 September 2005 Decision, para. 19.
[19] 4 September 2006 Decision, para. 22 ("No other grounds have been raised to suggest that the Chamber erred in law or failed to appreciate the relevant facts in the Kabiligi Exclusion Decision. Accordingly, there is no basis to reconsider any other legal or factual finding made therein.")
[20] T. 31 May 2004 p. 8.
[21] *Id.*, p. 25.
[22] *Id.*, p. 48.
[23] T. 11 June 2004 pp. 4-6.
[24] *Id.*, pp. 2-3.
[25] 27 September 2005 Decision, para. 19.

2006, the Chamber did not specifically address these allegations.[26]

16. The Chamber observes that the relevant testimony was given on 11 June 2004, and the challenges were submitted four months later, in the motion of 19 October 2004. There is no indication as to the reason for the lack of contemporaneous objection. The Chamber maintains its findings that the Defence had, and did not meet, the burden of proof.

(iii) Seven Allegations Not Raised in the Two Exclusion Motions

(e) Membership in AMASASU

17. Witness XXQ testified that the Accused was a member of the Amasasu group, which comprised "the senior officers who were living in Kigali"[27] and those who "planned the genocide".[28] During the testimony, the Kabiligi Defence objected generally to new information provided by the witness but not specifically to the Amasasu allegation.[29] Other Defence team objected to that allegation, which concerned their clients as well.[30] The Chamber ruled that there was notice of this material fact in the Prosecution Pre-trial Brief, which was filed on 21 January 2002.[31] Such notice is found in the list of Prosecution exhibits, which contains a reference to death squads and the AMASASU.[32] The Pre-trial Brief also stated that another witness (Witness XAQ) was anticipated to testify about the participation of soldiers in "death squads" in Kigali.[33] The Supporting Material accompanying the original Indictment, filed on 3 August 1998, cites an expert witness saying that "one notes in particular [within the armed forces] the creation of the AMASASU in January 1993 which demanded the establishment of a cleansed army and the elimination of all RPF allies".[34]

18. Paragraphs 1.13 to 1.16 of the Indictment refer to Hutu extremist groups, composed of prominent civilian and military leaders that worked on a strategy to eliminate the Tutsi and political opponents. Although the Accused is not expressly identified as a member of any group preparing such a strategy, the fact that the Accused is the indictee would reasonably suggest that he had some connection to an organization mentioned in his Indictment.

19. Consequently, on the basis of paragraphs 1.13 to 1.16 of the Indictment, the Supporting Material to the original Indictment, and the Prosecution Pre-trial Brief, the Chamber finds that the Accused was reasonably informed that this fact was part of the case against him and does not exclude the allegation by Witnesses XXQ.

20. A similar conclusion was made by the Chamber in a decision addressing challenges

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[26] The Chamber only made the general comment in para. 22 of the 4 September 2006 Decision (quoted in footnote 19).
[27] T. 11 October 2004 p. 28.
[28] *Id.*, p. 31.
[29] *Id.*, pp. 6-8, 11, 40.
[30] *Id.*, pp. 28-29.
[31] *Id.*, p. 40.
[32] Prosecution Pre-trial Brief, Annex A, Registry Pagination No. 6461 (document entitled "A.M.A.S.A.S.U. Alliance des Militaires Agacés par les Séculaires Actes Sournois des Unaristes: Naissance et raisons d'être des AMASASU).
[33] Prosecution Pre-trial Brief, Annex A, p. 143.
[34] Supporting Material, p. 13 (summarizing expert report of André Guichaoua). In addition, the summary for Expert Reyntjens, listed in support of paragraph 5.32 of the Indictment, makes reference to "death squads". Supporting Material, pp. 70-72.

made by Accused Ntabakuze, who is charged with Kabiligi under the same Indictment.[35] It is also recalled that the Chamber has previously denied a Kabiligi request to exclude evidence by Witness ZF concerning related issues (membership of the Accused in "zero network" or "dragon" group).[36]

(f) and (g) Firing of Artillery from Mount Kigali in May and July 1994

21. Witness AAA testified that the Accused fired three mortar rounds from Mount Kigali in direction of Mount Rebero, in presence of the Huye Battalion, on a day between 25 and 30 May 1994. Again, on 3 July 1994, the Accused fired three mortar rounds from Mount Kigali towards Mount Rebero, in presence of Major Ntilikina and Huye Battalion soldiers. He told the soldiers they were good, but were victims of the accomplices.[37]

22. The Defence did not contemporaneously object to this testimony and did not challenge it until the filing of the present motion. This is noteworthy as other portions of Witness AAA's testimony were challenged in the two Defence exclusion motions.[38]

23. Paragraph 4.4 of the Indictment refers to the military authority of the Accused over "units of the sectors of Byumba, Ruhengeri, Mutara and Kigali, as well as the elite units such as the Presidential Guard and the Para-Commando Battalion and the Reconnaissance Battalion". Paragraph 6.30 stipulate that the Accused from "about 10 April to about 31 May 1994 ... encouraged and supported the militiamen who were murdering Tutsi civilians ...".

24. In a motion filed on 24 March 2004, the Prosecution asked to add Witness AAA to its list. The motion summarized the witness's anticipated testimony, and noted that his statements had been disclosed to the Defence on 29 July 2003. The firing of artillery from Mount Kigali was mentioned in the disclosed statements. The motion did not reiterate the facts, but emphasized that the witness's statements include "detailed information about incriminating oral statements made by the accused". It further indicated that the evidence of the witness went directly to the responsibility of the Accused under Article 6 (1) of the Statute.[39] In allowing the Prosecution to add Witness AAA to its list, the Chamber noted that "the evidence appears to have probative value with respect to the charges against ... Kabiligi."[40] The witness testified on 15 June 2004, more than two months later.

25. On the basis of paragraphs 4.4 and 6.30 of the Indictment, the disclosure of the witness's statements in July 2003, and the Prosecution motion of 24 March 2004, the Chamber finds that the Accused was reasonably informed that the above allegations were part

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[35] *Bagosora et al.*, Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision (TC), 17 April 2007, para. 10 (the Defence had sufficient notice of allegations by Witnesses DCH, XAQ, and ZF concerning Ntabakuze's involvement in death squads and the AMASASU).

[36] 4 September 2006 Decision, paras. 15-16.

[37] T. 15 June 2004 pp. 4-6.

[38] The Defence exclusion motion of 19 October 2004 challenged two portions of the testimony of Witness AAA: (1) In April 1994, Kabiligi met at the prefecture of Kigali, with persons in charge of local administration, with the aim, among others, to distribute weapons to civilians; (2) in early May 1994, Kabiligi instructed *conseillers* in three sectors to search for accomplices of the *Inkotanyi* and to eliminate them. The second allegation was also challenged in the Defence exclusion motion of 5 April 2006.

[39] Prosecutor's Motion for Leave to Vary the Witness List pursuant to Rule 73 *bis* (E), 24 March 2004, paras. 8-9.

[40] *Bagosora et al.*, Decision on Prosecutor's Motion for Leave to Vary the Witness List pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, para. 16.

of the case against him, and does not exclude the testimony of Witness AAA.

(h) and (i) Presence and Orders at Saint André College

26. Witness DBQ testified that the Accused was present in the area of Saint André College in Kigali where civilians were killed by *Interahamwe* and soldiers.[41] Witness XXJ testified that the Accused gave orders to soldiers in the same area which resulted in the death of orphans.[42] The Defence filed a motion on 22 September 2003, a day before the witness was anticipated to take the stand, requesting generally to exclude new elements mentioned in belatedly disclosed statements by the witness.[43] The Chamber considers this as a contemporaneous objection.

27. Paragraph 6.38 of the Indictment pleads that soldiers under the orders of the Accused massacred Tutsi who sought refuge in a house across from Saint André school, in Kigali, and that these soldiers had been checking the identities and listing the names of the Tutsi refugees, as of May 1994. The Accused was charged with direct responsibility under 6 (1) on the basis of this material fact. Witnesses providing evidence in support of this, even if they testify that the Accused was present or gave orders at the scene of the crime, cannot be regarded as introducing new allegations outside the Indictment.

28. As mentioned above, Witness DBQ's evidence about Kabiligi's presence at Saint André College was challenged by the Defence in a motion filed on 22 September 2003, the day before the testimony. The Chamber found that:

> ... the new elements of testimony were substantially disclosed in the Indictments ... Sufficient notice ... that Kabiligi arrived at the scene after killings occurred, is given by the allegation that he ordered the killing of people at that specific location. The specific actions described are actually less prejudicial than, and may be taken as subsumed within, the accusation in the Indictments that the soldiers at that location were acting under his orders. When combined with the will-say disclosure in accordance with Rule 67(D), the Chamber considers this to be a detail which has been substantially disclosed.[44]

29. In the Supporting Materials accompanying the original Indictment, filed on 3 August 1998, an excerpt of a statement by a potential Prosecution Witness BU was included. It states:

> I would like to repeat here that I personally saw Gratien Kabiligi at Saint-André school in Nyamirambo in May-June 1994 ... He was leading the ex-FAR soldiers, who had taken up position at the school. These were the same soldiers who had killed the civilians at Saint-André. Everything pointed to the fact that they had acted on Kabiligi's orders. In any case, Kabiligi did nothing to prevent the massacres. He even sent soldiers to search

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[41] T. 23 September 2003 p. 70.

[42] T. 14 April 2004 pp. 49-50.

[43] Kabiligi Defence's Requête en extrême urgence de la Defence aux fins de rejet de nouvelles déclarations, etc., filed on 22 September 2003. The motion also alleged that the new information was unethically obtained by the Prosecution, in an attempt to pressure the Accused to enter in a plea agreement.

[44] *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 17. *See also Bagosora et al.*, Decision on Exclusion of Evidence under Rule 95 (TC), 27 January 2004, para. 5 ("the only new element of Witness DBQ's testimony in the will-say statements is that the Accused arrived at a place where Tutsis had previously been killed. It is inconceivable that the Prosecution would hazard the serious misconduct alleged in order to present evidence of such limited significance.").

for and kill me.[45]

30. The same witness's anticipated testimony was later summarized in the Prosecution Pre-trial Brief, which was filed on 21 January 2002. The summary indicated that the witness saw the Accused at the Saint André College, and its environs during May and June 1994, and spoke to him. It mentioned that the Accused "was leading the ex-FAR soldiers who'd taken up position at the school and killed civilians there".[46]

31. On the basis of paragraph 6.38 of the Indictment, the Supporting Material accompanying the original Indictment, and the Prosecution Pre-trial Brief, the Chamber finds that the Accused was reasonably informed that the above allegations were part of the case against him. The evidence of Witnesses DBQ and XXJ is not excluded.

(j) Order to Kill at Roadblock in Musambira

32. Witness DY testified that the Accused was present at a roadblock in Musambira and ordered a well-known *Interahamwe* to kill 10 persons there.[47] Four days before the testimony, the Defence submitted a notification in writing that it would object to portions of the evidence based on the witness's statement labelled DY-4, which it received late in the proceedings.[48] During the examination-in-chief, when the Prosecution indicated that it was about to ask the witness questions related to statement DY-4, the Defence objected to the introduction of new information deriving from that statement, including with respect to the event at the roadblock in Musambira.[49] The Chamber considers this as a contemporaneous objection. During the proceedings, the Chamber ruled:

> The Chamber has analysed the two statements previously given by the witness. We note that the information in DY-4 deviates from what is in DY-1 and DY-2, but the core of the event remains the same, namely, that General Kabiligi is passing by a certain location where an incident is taking place, where persons are being arrested, and the end result is that the "Inyenzi" are killed. The new element is the time at which the killing took place. In the Chamber's view, we cannot exclude this evidence. There is clearly a discrepancy between the version in DY-1 or 2, at least on the face of it, compared to DY-4, and it will be a matter for the Chamber, on the merits, to go into this, in particular, after having listened carefully to the cross-examination of this witness. It is also noted that this new issue was given in a will-say statement by the witness on the 14th of January and disclosed to the Defence on the 19th of January, five days later, so that the Defence has had three, four weeks in order to prepare for this change. We will then allow the Prosecution to proceed with this last element in your examination-in-chief.

33. Paragraph 5.1 of the Indictment stipulates that the Accused's plan to exterminate the Tutsi "consisted of, among other things, recourse to hatred and ethnic violence", and that in executing the plan, the Accused "organized, ordered and participated in the massacres perpetrated against the Tutsi population". Paragraph 6.31 refers to the authority of the Accused over military officer and militiamen, who committed massacres throughout Rwanda,

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[45] Supporting Material, pp. 129-130.
[46] Prosecution Pre-trial Brief, Annex A, p. 21.
[47] T. 16 February 2004 pp. 53-56.
[48] Defence for Kabiligi's notification to object to the testimony of Witness DY on the basis of witness declaration DY-04, 12 February 2004.
[49] T. 16 February 2004 pp. 48-49.

with the Accused's knowledge. This authority was allegedly exercised, among other ways, through giving orders. Accordingly, the Chamber finds that the facts as presented by Witness DY elaborate on the material facts in the Indictment. In the Supporting Materials which accompanied the original Indictment, filed on 3 August 1998, an excerpt of a statement by Witness DY contained a description of the event.[50]

34. The Chamber considers that sufficient notice was given to the Defence through paragraphs 5.1 and 6.31 in the Indictment, the Supporting Materials which accompanied the original Indictment, and Prosecution disclosures. It finds that the Accused was reasonably informed that the above allegation was part of the case against him, and that the evidence of Witness DY shall not be excluded.

(k) Distribution of Arms to Militia or Civilians

35. On 16 February 2004, Witness DY testified that the Accused distributed arms to militia or civilians, including to 150 *Interahamwe* from Gitarama prefecture.[51] There was no contemporaneous objection by the Defence to the evidence. The following day, Counsel for Kabiligi crossed-examined the witness on this issue.[52]

36. This evidence was first contested in the present motion. There is no explanation justifying the lateness of the challenge. The Chamber considers that the Defence has the burden of proof to establish that it had been prejudiced, and that it has not met this burden.

(iv) Nine Allegations Analysed in Previous Decisions

37. Nine allegations have been considered by the Chamber twice, in its decisions of 27 September 2005 and 4 September 2006.[53] The Chamber found that the Defence had sufficient notice through the Indictment, Pre-Trial Brief, and other post-Indictment disclosures. The Appeals Chamber Decision does not provide a basis to re-examine the Trial Chamber's

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[50] Supporting Material, p. 120: "On the road that leads to the Musambira commune office, we found ten or so people who had been stopped by a group of militiamen led by a man named ABDULHAMANI, who was an Interahamwe with a reputation nation-wide. KABILIGI had the armoured vehicle stop at the spot and they told him "Here are the inyenzi that we have arrested and we are still looking for more." KABILIGI told them to remain vigilant so that the Inyenzi would not infiltrate their ranks. We continued on the road to the Musambira market, where we turned back ... On our return, we saw that the people had been killed by the Interahamwe and their bodies were still at the roadblock. KABILIGI did not comment and we returned to Kigali."

[51] T. 16 February 2004 p. 43.

[52] T. 17 February 2004 p. 27.

[53] In respect of eight of them, the burden of proof was placed on the Prosecution. These allegations are that the Accused: (1) presided over a meeting in Ruhengeri on 15 February 1994, where it was decided or announced that the genocide would begin on 23 February 1994; Rwanda and Burundi plotted to prepare and commit the genocide (Witness XXQ); (2) told the conseillers of Nyamirambo, Nyakabanda and Biryogo sectors to eliminate accomplices of the Inkotanyi in their sectors, in early May 1994 (Witness AAA); (3) was present at the scene of the murder of a military deserter at a roadblock in Cyangugu (Witness XXH); (4) killed or had killed 100 persons at the Rusizi 1 roadblock in Cyangugu, which was established by him or his subordinates (Witness XXH); (5) gave a speech encouraging massacres at a meeting on 23 April 1994 with President Sindikubwabo at the MRND building in Cyangugu (Witness XXH); (6) presided over a meeting at the *Cercle Sportif* in Cyangugu, where he collected funds to purchase weapons to distribute to civilians in order to kill Tutsis (Witness XXH); (7) distributed gasoline vouchers to Yussuf Munyakazi (Witness XXH); (8) presided over a meeting in the Byumba military camp in 1992 where he allegedly told the soldiers "that they had to be vigilant and capture RPF infiltrators" (Witness XAI). In relation to one allegation, the burden was placed on the Defence but the Chamber nonetheless examined the notice issue: (9) the Accused was a member of the "zero network" and the Dragons (Witness ZF).

findings. Accordingly, the Chamber reiterates its findings with relation to these nine allegations, and finds no basis to exclude them.

(v) Cumulative Effect of Cured Defects in the Indictment

38. The Chamber will now look at the totality of cured defects in the Indictment to determine their cumulative effect on the ability of the Accused to prepare his defence.[54] The Appeals Chamber found:

> 26. The Appeals Chamber agrees that when the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudice an accused's right to a fair trial by hindering the preparation of a proper defence. The Appeals Chamber finds that the Trial Chamber failed to do so in the Impugned Decision and therefore, instructs the Trial Chamber to reconsider the Impugned Decision on this basis.

39. As stated by the Appeals Chamber, fairness is crucial in determining whether the Defence has been materially prejudiced in preparing its case. The question is whether the Accused was in a position to know and understand the allegations against him such that he could prepare a proper defence. The Chamber must determine, in particular, whether a large number of material facts were not pled in the Indictment and whether these defects, even if subsequently cured, prejudiced the right of the Accused to a fair trial.[55]

40. The Defence asserts that because over 70% of the current allegations against the Accused fall outside the Indictment, a substantial change occurred in the Prosecution case from the allegations in the Indictments compared to the strategy pursued at trial. Consequently, the Defence was left guessing at the evidence it had to meet until the close of the Prosecution case.[56] As it is too late to remedy the prejudice by granting the Defence additional time to properly prepare its case, the only available relief is excluding the allegations outside the Indictment.

41. The Chamber disagrees with the Defence that over 70% of the allegations against the Accused are outside the scope of the Indictment. The Defence lists 21 such allegations. Several of these 21 allegations are not material facts but evidence of material facts. Some examples have been considered above (paragraphs 18 and 27). Moreover, it is not correct, as

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[54] Subsequent to the Trial Chamber Decision, the Appeals Chamber rendered judgment in the *Ntagerura et al.* case and held that the Chamber has an obligation to determine whether a vague provision in the Indictment has been cured by timely, clear, and consistent information from the Prosecution. *Ntagerura et al.*, Judgment (AC), 7 July 2006, para. 65. The Chamber implicitly did so in making its findings on the impugned evidence, wherein it held that defects had not been cured by proper notice in three instances. Trial Chamber Decision, paras. 31, 54-55, 60.

[55] Appeals Chamber Decision, paras. 26, 30 (referencing *Kupreškić et al.* Appeals Chamber Judgement).

[56] Motion, paras. 14-21.

argued by the Defence, that only eight material facts are included in the Indictment.[57] There are additional material facts in the Indictment, on which responsibility under Article 6 (1) is attributed to the Accused.[58] Furthermore, the Indictment attributed responsibility to the Accused under Article 6 (3) on the basis of facts which were not listed by the Defence in its motion.[59]

42. As discussed above, in the case of most of the allegations which the Defence claims are outside the Indictment, notice was provided through the Indictment, the Supporting Material, and the Prosecution Pre-trial Brief. The Chamber finds that any curing of defects in the Indictment through notice of new material facts which occurred prior to or at the commencement of trial was sufficient to inform the Accused of the allegations against him such that he could prepare a proper defence. This occurred four years before the Defence would even begin presentation of its case.

43. The Prosecution filed the Supporting Material on 3 August 1998, the Amended Indictment on 13 August 1999, and the Prosecution Pre-trial Brief on 21 January 2002. Trial proceedings began on 2 April 2002 and were then suspended until September 2002. Although thirty-two trial days were held during 2002, the trial did not build real momentum until proceedings resumed before this Trial Chamber in June 2003. The Prosecution closed its case on 14 October 2004. The Kabiligi Defence commenced its case on 6 September 2006.

44. Consequently, the Chamber finds that the number of alleged deficiencies in the Indictment and the timing and means by which they were cured – most often well in advance of trial and years before the Defence began the presentation of its case – did not render the trial unfair and did not materially prejudice the Accused. The Chamber reiterates that the admission of evidence is not to be confused with the ultimate weight to be accorded to the evidence.[60]

45. The Defence also claims that it suffered prejudice because of the demise of potential Defence witnesses who died between the date on which the Indictment was confirmed and when the Prosecution case "finally stopped changing".[61] These individuals could have assisted the Defence in rebutting the additional allegations. In its decision of 4 September 2006, the Chamber dismissed this argument. In light of the additional Defence arguments in the present motion, the Chamber has reconsidered the issue but reiterates its position.[62]

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[57] Motion, para. 12.

[58] For example, the Defence listed as a material fact in the Indictment, the allegation that the Accused conspired with others to work out a plan with the intent to exterminate the civilian Tutsi population and eliminate political opponents. It failed to mention that paragraph 5.1 of the Indictment also elaborates on the components of the plan. Additional examples include the material facts alleged in paragraphs 6.29, 6.31, and 6.38 of the Indictment.

[59] According to the Indictment, the facts in paragraphs 5.35, 5.36, 6.8, 6.15, 6.16, 6.18, 6.19, 6.25, 6.32 to 6.39, 6.41 to 6.45, 6.47, 6.51 therein provide bases for charges against the Accused under Article 6 (3) of the Statute.

[60] *Nyiramasuhuko,* Decision on Pauline Nyiramasuhoko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, paras. 6-7. *See also Bagosora et al.*, Decision on Ntabakuze Motions to Admit Documents Under Rule 92 bis (TC), 12 April 2007, para. 9; *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007, para. 6.

[61] Motion, para. 22.

[62] 4 September 2006 Decision, para. 12.

FOR THE ABOVE REASONS, THE CHAMBER

AFFIRMS its decision of 4 September 2006.

Arusha, 23 April 2007

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

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Case Name:	The Prosecutor vs. **Bagosora et el**		**Case Number:** ICTR-98-41-T	
Dates:	Transmitted: **23 April 2007**		Document's date: **23 April 2007**	
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