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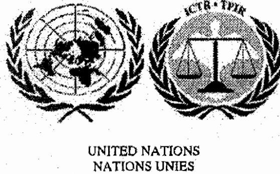

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(16777-16766)

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 18 September 2003

2003 SEP 18 A 9: 25
ICTR

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON ADMISSIBILITY OF PROPOSED TESTIMONY OF WITNESS DBY

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal"),

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

BEING SEIZED OF the objections by the Defence to proposed testimony of Witness DBY, made orally on 12 September 2003;

CONSIDERING the "Joint Defence Brief Regarding the Admissibility of Evidence of Criminal Acts Alleged to Have Been Committed By the Accused Outside the Period of the Trial Chamber's Temporal Jurisdiction", filed on 15 September 2003; and the Prosecution "Response" thereto, filed on 15 September 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 12 September 2003, Prosecution Witness DBY appeared before the Chamber to testify. Based upon a witness statement taken on 2 and 3 December 1999 and the theme of questions being posed by the Prosecution, it became apparent that the witness was about to give testimony concerning actions of the Accused before 1 January 1994.[1] The Defence objected to the testimony, and requested the Chamber to rule it inadmissible and to direct that the testimony not be heard. In response to questions from the Bench, the Prosecution indicated a series of different topics in the witness statement on which it intended to elicit testimony:

Category I: Orders and actions of Defendant Ntabakuze on four specific occasions: 3, 5, and 9 October 1990 and some date in January 1991; on one of these occasions, 5 October 1990, the Defendant Bagosora is also identified as having engaged in the same actions as Ntabakuze;

Category II: A telegram seen by Witness DBY at the end of 1992 or beginning of 1993 sent by the Defendant Bagosora identifying Tutsi as the enemy and leading to the dismissal of Tutsi from the army;

Category III: A telegram seen by the witness in 1992 sent by Defendant Bagosora requesting delivery of weapons to the Ministry of Defence for distribution, which the witness later saw in the possession of *interahamwe*.

SUBMISSIONS

2. The Prosecution acknowledges that, in accordance with the temporal jurisdiction of the Tribunal, the indictments charge the Accused with crimes committed between 1 January and 31 December 1994.[2] Placing reliance on a Separate Opinion of Judge Shahabudeen in the *Media* case, the Prosecution nevertheless argues that evidence of events prior to that period is admissible to prove the commission of those crimes in 1994. Evidence of events prior to 1 January 1994 may be admitted for one of three purposes: as proof of "ongoing criminal conduct which culminates in 1994"; to place the events of 1994 in their proper context; and

[1] The witness statement is identified as "DBY-1".
[2] As the criteria for admission of evidence under Rule 89(C), discussed *infra*, depend on the purposes for which it is tendered, it is convenient to set out the Prosecution's submissions first.

under the rubric of "similar fact evidence, as authorised specifically by Rule 93".[3] These submissions are discussed in more detail in the Deliberations section below. In respect of the first purpose, the Prosecution claims in particular that the evidence is probative of an ongoing conspiracy of indeterminate length that existed at the time of the events in 1990.

3. The Defence argues that the Prosecution's reliance on Judge Shahabuddeen's Opinion is misplaced. Rather than addressing the admissibility of evidence of pre-1994 events, that opinion decided only that pre-1994 incidents may be mentioned in an indictment without ruling on the admissibility of such evidence; the question of admissibility of evidence was identified as a distinct issue for the Trial Chamber.[4] Even if evidence of pre-1994 events may, in principle, be admitted, Witness DBY's testimony does not meet the criteria for admission set forth in Rule 89(C) or Rule 93 of the Rules of Procedure and Evidence ("the Rules"). The evidence is neither relevant nor probative of any facts in issue in this case. Further, the evidence is highly prejudicial as it suggests the bad character of the accused. Any probative value that might exist is outweighed by the improper prejudice caused to the Accused. Rule 93 gives the Prosecution no licence to extend the temporal range of events which it may tender and, in any event, should only exceptionally permit the admission of otherwise inadmissible evidence. Finally, the Defence argues that admission of this testimony will greatly complicate and lengthen the trial as it will be obliged to contest these events.

DELIBERATIONS

General Principles

4. Rule 89(C) provides that a Chamber "may admit any relevant evidence which it deems to have probative value". This simple formulation sets out three distinct aspects of the process of determining admissibility. First, the evidence must be in some way relevant to an element of a crime with which the Accused is charged. Second, the evidence must have some value in proving the elements of the crimes with which an Accused is charged. The separate reference to "probative value", and to the requirement that the Chamber must "deem" that the evidence has that quality, suggests that probative value is a different and more complex hurdle than relevance. Third, even where these two criteria are met, Rule 89(C) does not command, but merely permits, admission of the evidence.

5. The issue confronting the Chamber concerns a particular type of relevance: whether testimonial evidence of a witness concerning events prior to 1994 is relevant to, and probative of, charges of crimes committed only within that year.

6. The jurisprudence of the Tribunal on this particular question is limited. However, a discussion of general principles is to be found in decisions in the *Media* case which addressed whether events prior to 1994 – that is, prior to the temporal jurisdiction of the Tribunal -- may be recounted in an indictment.[5] The Trial Chamber ruled that:

> information that falls outside of the temporal jurisdiction of the Tribunal may be useful in helping the accused and the Chamber to appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda,

[3] *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva, Gratien Kabiligi, and Aloys Ntabakuze*, Prosecution Response, 15 September 2003, p. 6 ("Prosecution Response").
[4] *Prosecutor v. Hassan Ngeze and Ferdinand Nahimana*, Décision sur les appels interlocutoires, Separate Opinion of Judge Shahabuddeen, 5 September 2000 ("Shahabuddeen Opinion").
[5] Article 1 of the Statute states, in relevant part: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed...between 1 January 1994 and 31 December 1994...."

> during 1994. Furthermore the Chamber is of the view that the proper stage to determine the admissibility and evidential value, if any, of the paragraphs that contain information about events that occurred prior to 1 January 1994, is during the assessment of evidence.[6]

That decision was upheld by the Appeals Chamber, which confirmed that the indictment did not purport to charge the Accused with crimes committed prior to 1994, but merely to provide an introduction, and historical background and context, to the crimes committed in 1994. Two separate opinions were filed along with the decision of the Appeals Chamber, of which that of Judge Shahabuddeen is of particular assistance to the question of the admissibility of evidence of pre-1994 events. His principal concern was the jurisdictional question, but in so doing he rejected the assertion that pre-1994 events are categorically irrelevant to crimes within the jurisdiction of the Tribunal:

> But there is a distinction between the legal elements of a crime and and the evidence of their existence. The prosecution has to prove that all the legal elements of a crime were present at the time of commission of the crime, that is to say, at the time within the mandate year when the crime is alleged to have been committed. However, there is no reason why the evidence of their existence at that point in time cannot (in some cases, at any rate) include evidence deriving from a time prior to the commencement of the mandate year.[7]

7. Having so found, Judge Shahabuddeen specifically disclaimed ruling on the admissibility of any particular evidence that might be tendered at trial:

> My holding is only that the amended indictment does not charge the appellant with any crimes committed before the commencement of the mandate year. That holding does not exclude the competence of the Trial Chamber in the course of the actual trial from shutting out evidence of previous crimes on the ground that, in the circumstances of the case, the particular evidence *is not in fact relevant or that, if it is, its prejudicial effect on the accused exceeds its probative value. That is an evidentiary issue, not a jurisdictional one….*[8]

8. Evidence of events prior to 1 January 1994 is not clearly separated from crimes charged in the indictment. Such events may be relevant to, and probative of, the commission of crimes in 1994. In deciding the jurisdictional question, Judge Shahabuddeen sets out three possible avenues, all of which have been invoked by the Prosecution, by which evidence of such events may properly be considered relevant. These three bases of relevance are discussed at the outset, before considering the probative value of the specific evidence tendered, or whether its value is outweighed by its prejudicial effect.

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[6] *Prosecutor v. Ferdinand Nahimana*, Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence, 12 July 2000, p. 4. See also *Prosecutor v. Ferdinand Nahimana*, Decision on the Prosecutor's Request for Leave to File and Amended Indictment, 5 November 1999, para. 27: "The Trial Chamber recognizes the possibility that these allegations may be subsidiary or interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value. The Trial Chamber is therefore of the view that it is premature to address the relevance of and admissibility of these allegations at this stage of the proceedings. The appropriate stage will be at the trial of the accused."

[7] Shahabuddeen Opinion, para. 9.

[8] *Id.* para. 40 (italics added).

i) Evidence Relevant to an Offence Continuing Into the Mandate Year

9. The Prosecution does not exceed its mandate by charging an individual with an offence that begins at some date prior to 1994, but continues into that year. In respect of conspiracy, "the charge could correctly be for a conspiracy made in, or continuing into, the mandate year even though the original conspiracy agreement was made prior thereto".[9] Accordingly, evidence tending to show the existence of an ongoing criminal act that began prior to 1994 but whose object was only realized in 1994 is admissible. The Prosecution claims generally that Witness DBY's testimony is relevant to the existence of a conspiracy that commenced before 1994 and continued into that year.

ii) Context or Background

10. Where an event is not itself part of the crime charged, but without which "'the account...would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence'".[10] Evidence of the nature of the relationship between a victim and an accused, and possible motives for the commission of a crime, may be admitted on this basis.[11] Establishing motive may also be relevant to *mens rea*. Judge Shahabuddeen noted that this category should be viewed broadly, in light of the "scale of events, in space and time", and the fact that prejudicial background information will be less damaging when heard by professional judges than a jury.[12]

(iii) "Similar Fact Evidence"

11. The third avenue for admission of evidence of pre-1994 events is based on an exception, long-established in the common law, for admitting evidence of particular category of acts committed prior to the time of the act which is charged.

12. The exception can only be described in relation to the general rule. A long-standing principle of common law jurisdictions, adopted by the International Criminal Tribunal for Yugoslavia, is that "as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the accused's propensity to act in conformity therewith."[13] This means that prior criminal offences by the accused – even of precisely the same offence with which the accused is charged – are not admissible if the only purpose for their introduction is to establish that the accused was capable of committing the offence, is inclined to commit the offence, or on some prior occasion actually did have the intent to commit the criminal offence. Such evidence is excluded because the evidence may so severely blacken the reputation of the accused as to make acquittal virtually impossible, even though the direct evidence of the commission of the offence is weak. Further, dealing with evidence of past conduct may be unduly distracting and time-consuming, leading to an unfocused trial that undermines the truth-finding function.[14]

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[9] *Id.* para. 14.

[10] *Id.* para. 21, quoting *R. v. Pettman*, 2 May 1985, unreported, per Purchas LJ.

[11] *Id.* para. 20.

[12] *Id.* para. 24.

[13] *Prosecutor v. Kupreskic*, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999. One type of evidence which is well-recognised in the world's common law systems as relevant and yet generally inadmissible is past conduct used to establish that the accused "has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence." See also 31.

[14] *R v. Handy*, [2002] 2 SCR 908, paras. 139-147.

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13. The definition of similar fact evidence in the Shahabuddeen Opinion is taken from an Australian case:

> '[I]f the evidence of the other offence or offences goes beyond showing a mere disposition to commit crime or a particular kind of crime and points in some other way to the commission of the offence in question, then it will be admissible if its probative value for that purpose outweighs or transcends its merely prejudicial effect. The cases in which similar fact evidence may have sufficient additional relevance to make it admissible are not confined, but recognized instances occur where the evidence is relevant to prove intent, or to disprove accident or mistake, to prove identity or to disprove innocent associations....'[15]

Shahabuddeen's gloss on this passage is that "evidence of prior offences is admissible to prove a pattern, design or systematic course of conduct by the accused where his explanation on the basis of coincidence would be an affront to common sense."[16]

14. Other discussions of similar fact evidence explain that it is admissible because it reveals a propensity that "'is so highly distinctive or unique as to constitute a signature'".[17] In such cases, the evidence is of type which is not probative of merely a general propensity to commit the criminal act, but is probative of some peculiar feature of the case which substantially enhances its probative value in relation to the charge. Defining what type of evidence is sufficiently specific so as to migrate out of the prohibited zone of general propensity evidence, is a difficult exercise which depends on the facts of each case. The prejudicial effect on the character of the accused must also be considered, and whether the prosecution can achieve its stated object using less prejudicial evidence.[18]

iv) Probative Value and Prejudice

15. Probative value is a second criterion of admissibility set out in Rule 89(C). It has been described simply as "'evidence that tends to prove an issue'" and is sometimes conceived as overlapping with the concept of relevance: "For one fact to be relevant to another, there must be a connection or a nexus between the two which makes it possible to infer the existence of one from the other. One fact is not relevant to another if it does not have real probative value with respect to the latter."[19]

16. Though not expressly mentioned in Rule 89, prejudice is also relevant to the determination of admissibility.[20] It is clear from Judge Shahabuddeen's Opinion in the *Media* case that relevant and probative evidence may be excluded on the grounds of "prejudice":

> It being recognised that all relevant prosecution evidence is prejudicial to the accused and the more probative the more prejudicial, still it is possible in some cases to say that the probative value of the particular evidence is outweighed by its prejudicial effect; in such a case the evidence is to be excluded.[21]

[15] Shahabuddeen Opinion, para. 20, quoting *Thomson v. R.*, (1989) 86 A.L.R. 1.
[16] Shahabuddeen Opinion, para. 20.
[17] *R. v. Handy*, [2002] 2 SCR 908, para. 77 quoting *R. v. Scopelliti* (1981), 63 CCC (2d) 481 (Ont. CA).
[18] Id. at para. 83.
[19] *R v. Cloutier* [1979] 2 SCR 709, p. 731, as quoted in *Prosecutor v. Delalic*, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 Into Evidence", etc., 19 January 1998, para. 29.
[20] *Cf.* Rule 89(D) of the Rules of the International Criminal Tribunal for Yugoslavia, which provides that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."
[21] Shahabuddeen Opinion, para. 19.

17. Evidence of past crimes, introduced merely to blacken the character of the Accused and show a propensity and capacity to commit the crimes charged, is improper. This is so because the damning effect of the evidence tends to outweigh its true probative value and to obscure more direct evidence of the crime alleged. In this sense, the evidence is "prejudicial" in a manner that compels exclusion.

18. Relevance, probative value and even prejudice are all relational concepts. The content of the putative facts must be defined and then evaluated in relation to their possible value as proof of the existence of a crime as described in the indictment. The nature of this evaluation explains the discretion conferred on the Trial Chamber by Rule 89(C).

Application of General Principles to the Evidence of Witness DBY

19. The Prosecution accepts that the charges against the Accused concern crimes committed between 1 January and 31 December 1994.[22] The sole issue confronting the Chamber here is whether evidence of events prior to that period is relevant to those alleged crimes, and whether the probative value of that evidence outweighs its prejudicial effect on the assessment of the crimes alleged.

i) Ongoing Criminal Offence

20. On the basis of the case law summarized above (para. 9), it is the view of the Chamber that evidence tending to show the existence of an ongoing criminal act that began prior to 1994 but whose object was only realized in 1994 is admissible.[23] The Prosecution claims generally that Witness DBY's testimony is probative of the existence of a conspiracy that continued into 1994 and should be admitted on that basis.

21. The purported evidence in Category III is plainly relevant and admissible on this ground. It is alleged that one of the Accused requested weapons in 1992 for distribution to militia, which are alleged to subsequently have been seen in the possession of militia and used to commit criminal acts in 1994. The evidence may tend to show the existence of an ongoing criminal plan; the existence of an armed militia in 1994 and its relationship with the military; and the militia's relationship with the Accused and his individual criminal responsibility for their acts. Of course, none of these conclusions have yet been proven, and the Chamber is making no assessment here of the reliability or credibility of the evidence. The standard for admissibility, however, is simply that the evidence is relevant and has the prospect of probative value. This evidence satisfies both of these conditions and does not improperly prejudice the Accused.

22. The relevance of the evidence in Category II is difficult to assess under this heading, and is deferred to the next section, concerning background evidence.

23. The evidence in Category I relates to orders given, and actions taken, by the Accused Ntabakuze and Bagosora on occasions in October 1990 and January 1991. According to the Prosecution, this is relevant to and tends to prove the existence of a conspiracy that continued from October 1990 through the events of 1994.[24] The Defence has pointed to passages from the testimony of the Prosecution's own expert witness, Alison Des Forges, which seem to contradict that contention. In response, the Prosecution quoted Dr. Des Forges's testimony

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[22] Prosecution Response, p. 2.

[23] Shahabuddeen Opinion, para. 11: "In the result, the charge could correctly be for a conspiracy made in, or continuing into, the mandate year even though the original conspiracy agreement was made prior thereto."

[24] Transcripts of 12 September 2003, p. 56: "This is the commencement of the conspiracy, Your Honour."

that she refused "to be pinned down to a single date," but stopped short of repeating its claim that a conspiracy existed in 1990 in respect of which the evidence is probative.[25]

24. The Chamber recalls that Dr. Des Forges stated her position as follows:

> "Q.: Now a certain witness in the *Akayesu* case, Professor Filip Reyntjens, commenting on these events suggested that there had been a trial run, a trial-run to the massacres that happened in 1994. Do you agree with that; in other words, a dress rehearsal of the 1994 genocide; would you agree with that assessment? A.: To make that assessment requires a conclusion that from the very beginning, that is, from 1990, it was foreseen that these various smaller attacks could and probably would lead to a larger scale genocide. I have said that I myself do not support the idea that this idea of genocide or a plan of genocide was clearly established in October 1990. So I would prefer to say that it appears there was a pattern of learning and finding which elements work and then using them again the next time, rather than setting out from the start in 1990 with the notion of dress rehearsals to arrive at a final grand performance that one knew would come one day."[26]

25. Whether a conspiracy existed in October 1990 in which the Accused participated is, of course, a matter that can only be assessed after hearing the totality of the evidence. The issue here is not whether there is evidence already heard in the trial that establishes (or negates) the existence of the conspiracy, but rather whether a sufficient nexus of relevance and probativeness connects the evidence with the crime alleged. This involves comparing the evidence tendered with the specific crime alleged.

26. The connection between the proffered evidence and the crime alleged is tenuous. The events of October 1990 and January 1991 to which Witness DBY wishes to testify are said to occur in the context of repelling an invading military force from Uganda. The specific evidence here concerning the Accused Ntabakuze is that (a) on 3 October 2003 he issued an order to shoot anyone seen along a certain road in the area of military activities; (b) that on 5 October 1990, in the vicinity of Kigali, along with the Accused Bagosora, he ordered his men to arrest anyone without an identity card and "all suspicious looking Tutsis", and that some of these suspects were later beaten to death; (c) that Ntabakuze himself participated in these arrests on 5 October 1990 and appeared to use a list; (d) that on 9 October he ordered farms to be destroyed and civilians killed on the basis of a suspicion that they were aiding the invading force; and (e) that in January 1991 he ordered the execution of prisoners, both Hutu and Tutsi, who had been released from a Rwandan prison by the invading force.

27. What is required for admission is that the evidence, either on its own or viewed in the light of other evidence, be probative of a conspiracy. The Prosecution has not explained with particularity how these pieces of evidence show the existence of a conspiracy in 1990 to commit the criminal acts that were allegedly committed by the Accused in 1994. The Prosecution made no such claim or argument in its written submissions.[27] Such a connection would be obvious if, for example, the testimony concerned the content of a conspiratorial

[25] Transcripts of 19 November 2002, p. 39.

[26] Transcripts of 16 September 2002, p. 122. See also Transcripts of 19 November 2002, p. 37: "You will see that in my answer I referred to 1990 and say that I do not subscribe to the thesis that there was a genocidal plan beginning in 1990. I speak instead of a pattern of learning, of incorporating certain elements that are repeated time after time, the same elements then also appearing at the time of the 1994 genocide."

[27] "More particularly, this evidence goes to the acts of Ntabakuze in both the targeting and the killings of certain individuals, such as Tutsi civilians and non-combatants; the existence of a command structure; how orders within that command structure were given and executed; the opportunity to prevent subordinates from committing criminal acts and to punish subordinates for having committed such acts." Prosecution Response, p. 7.

agreement; meetings at which an agreement was made; references by individuals to the existence of an agreement; or patterns of conduct showing that individuals were acting in accordance with the terms of some agreement. In light of the absence of a foundation for the contention – and, indeed, the contrary testimony in this regard from Dr. Des Forges – that an ongoing conspiracy existed in 1990, the Prosecution has failed to make the requisite showing of relevance or probative value of *this particular* evidence to a conspiracy that continues through 1994. However, the Chamber accepts item (c) as admissible, because the drawing up of lists may imply some sort of concerted preparation by several individuals and it cannot, at this stage of the proceedings, be ruled out that further evidence may place this incident in context.

28. Any probative value that the evidence may have is outweighed by its serious prejudicial effect. Four of the five events to which Witness DBY will testify concern allegations that the Accused Ntabakuze committed the very same acts – killings of civilians – which form the basis of the charges in the indictment, but with which he is not charged because of the temporal jurisdiction of the Tribunal. The Accused must be found guilty on the basis of evidence of the crimes charged, not on the basis of evidence that he committed the offence on prior occasions and, therefore, had a propensity to commit them again.[28] It is true that Chambers composed of professional judges may be less susceptible to distraction or prejudice by the admission of irrelevant or prejudicial evidence than juries.[29] But hearing extensive examination and cross-examination on the evidence in question would distract the Chamber from the proper focus of the trial, namely, the events charged in the indictment, and lengthen the trial.

29. Accordingly, the Category I evidence, concerning the orders to kill civilians and destroy the property by Ntabakuze in October 1990 and January 1991, and the arrests and killings of civilians by Ntabakuze and Bagosora on 5 October 1990, is not admissible on the basis of proof of an ongoing offence.

(ii) Context or Background

30. The evidence in Category II should be admitted as background evidence (see para. 10 above). Witness DBY is expected to testify that he saw a telegram from one of the Accused to military units which identified the Tutsi as the enemy because they were providing information to the RPF; requested that the Tutsi be "localised"; and that all Tutsi should be dismissed from the army.

31. The information is relevant to the Accused's relationship with the Tutsi as a group. It may tend to establish motives for acts that he is alleged to have committed in 1994, although the probative value at this stage is still difficult to weigh. The information is not unduly prejudicial as it does not describe any prior criminal acts charged in the indictment. The

[28] *Prosecutor v. Kupreskic*, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999. See also *R v. Handy*, [2002] 2 SCR 908, paras. 37, 39: "The policy basis for exclusion is that while in some cases propensity inferred from similar acts may be relevant, it may also capture the attention of the trier of fact to an unwarranted degree. Its potential for prejudice, distraction and time consumption is very great and these disadvantages will almost always outweigh its probative value. It ought, in general, to form no part of the case which the accused is called on to answer." … 'The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.'

[29] Cf. *Prosecutor v. Zejnil Delalic, Hazim Delic, and Esad Landzo*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 20; Shahabuddeen Opinion, para. 24.

Chamber reiterates that none of the inferences that the Prosecution intends to establish are proven and that the Accused is, of course, entitled to offer explanations for these statements that negate such inference. The only issue before the Chamber now is whether the evidence should be heard.

32. The information concerning dismissal of Tutsi from the army is also relevant as an explanation of the ethnic composition of the military as it may have existed in 1994. That ethnic composition is a background fact which may assist the Chamber in understanding the milieu in which the Accused were operating. Their role in shaping that military is also helpful to the Chamber and is not significantly prejudicial.

33. The Chamber further observes that evidence of military operations in 1990 and 1991 can be relevant as background evidence. Such evidence may offer the Chamber a broader understanding of the relationship between Tutsi and Hutu as it existed in 1994, and the social and institutional context of the Accused and the military. The positions and actions of the Accused within that hierarchy before 1994 are also admissible as background.

34. However, the Prosecution may not lead evidence of the specific allegations contained in Category I as background evidence. The narrative of events would not be "incomplete or incomprehensible" without this evidence. It has not been shown that these specific incidents serve the purposes claimed by the Prosecution: to illuminate the military command structure; how orders within that command structure were given and executed; or the mechanisms of military discipline in the Rwandan army. Whatever small probative value there may be is outweighed by the improper prejudice that would be caused to the Accused by permitting evidence of these past criminal acts, up to four years before the events in 1994, with which they are not charged.[30]

(iii) Prior Acts and "Similar Fact Evidence"

35. As previously discussed (see paras. 11-14), the prior commission of the acts with which a Defendant is charged are inadmissible if the purpose for their introduction is to show a general propensity or disposition to commit the acts. This does not preclude the introduction of such evidence for other valid purposes, if those purposes exist, and if they outweigh the prejudicial effect of the evidence. In such cases, the direct link between the prior act and the act charged is said to reverse the usual balance of probative value and prejudicial effect in favour of the former.

36. The Prosecution argues that the Category I evidence should be admitted as similar fact evidence, which is said to be liberally permitted under Rule 93.

37. At the outset, the Chamber rejects the view that Rule 93 broadly authorizes the admission of evidence of prior criminal acts that are the same as acts alleged in the indictment. "Pattern of conduct" has generally not been used to introduce evidence of crimes not alleged in the indictment, but has rather been used as the basis for inferences of intent from actions which *are* alleged in the indictment.[31] Based on these precedents, there is reason to believe that Rule 93 has little to say about the general standard of relevance and probativeness set out as the basic test of admissibility in Rule 89(C).

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[30] The situation here may be contrasted with that in *R v. Sidhu*, referred to in the Shahabuddeen Opinion, para. 22. There, the accused was charged with possession of explosives.

[31] *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 534; *Prosecutor v. Bagilishema*, Case No. ICTR-951A-T, para. 50.

38. The Chamber is of the view that the similar fact evidence exception is not satisfied in this case. No indication has been given as to why these incidents are an exceptional, unique, or peculiar form of the criminal act alleged so as to make it highly probative of the acts alleged in the indictment. On the other side of the scale, these events severely blacken the character of the accused and imply a propensity to commit the acts. The following factors mentioned in a leading Canadian decision, *R v. Handy*, on whether to admit evidence as similar fact evidence, are relevant here:

(1) proximity in time of the similar acts;
(2) extent to which the other acts are similar in detail to the charged conduct;
(3) number of occurrences of the similar acts;
(4) any distinctive feature(s) unifying the incidents;
(5) intervening events;
(6) any other factor which would tend to support or rebut the underlying unity of the similar acts.[32]

These factors must then be weighed against the likely prejudice to the Accused, including the "inflammatory nature of the similar acts and whether the [Prosecution] can prove its point with less prejudicial evidence", and potential for distraction of the court.[33]

39. Without reviewing the many decisions from national systems in which evidence has been introduced under the "similar fact" exception, there is little doubt that the evidence tendered by the Prosecution in Category I does not come close to meeting the criteria for admission. The Prosecution has not identified with sufficient particularity the distinctive or unique features of this evidence, or what it might prove *other than* that the Accused committed the same offence on prior occasions. The evidence has low probative value, but has substantial prejudicial effect for reasons already discussed. This evidence does not qualify as similar fact evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS THE MOTION IN PART

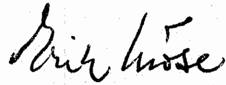
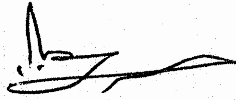
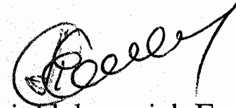
DECLARES inadmissible the proposed testimony of Witness DBY that (a) on 3 October 1990, the Accused Ntabakuze issued an order to shoot anyone seen along a certain road in the area of military activities; (b) on 5 October 1990, in the vicinity of Kigali, along with the Accused Bagosora, Ntabakuze ordered his men to arrest anyone without an identity card and "all suspicious looking Tutsis" and that some of these suspects were later beaten to death; (c) on 9 October Ntabakuze ordered farms to be destroyed and civilians killed on the basis of a suspicion that they were aiding the invading force; and (d) in January 1991 Ntabakuze ordered that prisoners, both Hutu and Tutsi, who had been released from a Rwandan prison by the invading force be executed.

DECLARES admissible the proposed testimony of Witness DBY in respect of: that Ntabakuze participated in arrests on 5 October 1990 and appeared to use a list; a telegram seen by the witness at the end of 1992 or beginning of 1993 sent by the Bagosora identifying Tutsi as the enemy and leading to the dismissal of Tutsi from the army; a telegram seen by the witness in 1992 sent by Bagosora requesting delivery of weapons to the Ministry of Defence for distribution, which the witness later saw in the possession of *interahamwe*;

[32] *R. v. Handy*, [2002] 2 SCR 908, para. 83.
[33] *Id.*

general evidence concerning events in 1990 and 1991, including the general role of the Accused, but without touching on the prohibited evidence as described above.

Arusha, 18 September 2003

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

[Seal of the Tribunal]