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

ICTR-98-41-T
27-09-2005
(25460-25452)

25460
S. Mwasa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 27 September 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON EXCLUSION OF TESTIMONY OUTSIDE THE SCOPE OF THE INDICTMENT

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 25459

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 "Requête en extreme urgence aux fins de rejet des témoignages sur des faits qui ne figurent pas dans l'acte d'accusation", filed on 19 October 2004;

CONSIDERING the Prosecution Response thereto, filed on 29 October 2004; the Kabiligi Defence Supplementary Memorandum, filed on 26 April 2005; the Prosecution Response thereto, filed on 6 May 2005; the Kabiligi Reply, filed on 10 May 2005; the Prosecution Response to that Reply, filed on 11 May 2005; and the Defence Amended Reply to that Response, filed on 12 May 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence for Kabiligi requests that portions of the testimony of eight witnesses heard during the Prosecution case be excluded from the Chamber's consideration. It argues that the testimony in question cannot be connected to any material fact alleged in the Indictment, which is a condition of its admissibility. General references in the Indictment to "planning", "organising" and "conspiring" by the Accused are said to be too vague to justify admission of the evidence.

DELIBERATIONS

2. Rule 89 (C) provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged."[1] The present motion complains that the evidence has no relevance to anything in the Indictment, or that some paragraphs of the Indictment to which it might be relevant are too vague to be taken into account. Some recent Appeals Chamber judgements thoroughly discuss the specificity with which an indictment must be pleaded, and the significance of other forms of Prosecution disclosure of its case.[2] Although the question addressed in those cases was whether a conviction should be quashed because of insufficient notice of a charge in the indictment, the analysis is equally relevant to the present question, namely, whether evidence is sufficiently related to some charge in the Indictment to be admissible.

3. The rights of the Accused enshrined in Article 20 of the Statute impose, according to the Appeals Chamber in *Kupreškić*, "an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven".[3] Material facts may also be communicated to the Accused other than through the indictment:

> If an indictment is insufficiently specific, *Kupreškić* stated that such a defect 'may, in certain circumstances cause the Appeals Chamber to reverse a conviction.' However,

[1] *Bagosora et al.*, Decision on Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 4.
[2] *Ntakirutimana*, Judgement (AC), 13 December 2004; *Niyitegeka*, Judgement (AC), 9 July 2004. The principles set out in these two judgements have been applied in subsequent judgements: *Semanza*, Judgement (AC) 20 May 2005, paras. 85-88; Kamuhanda, Judgement (AC), 19 September 2005, paras. 13-28.
[3] *Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 88.

> *Kupreškić* left open the possibility that a defective indictment could be cured 'if the Prosecution provides the Accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.' The question whether the Prosecution has cured a defect in the indictment is equivalent to the question whether the defect has caused any prejudice to the Defence or, as the *Kupreškić* Appeals Judgement put it, whether the trial was rendered unfair by the defect. *Kupreškić* considered whether notice of the material facts that were omitted from the indictment was sufficiently communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial. In this connection, the timing of such communications, the importance of the information to the ability of the Accused to prepare its defence, and the impact of the newly-disclosed material facts on the Prosecution case are relevant. As has been previously noted, 'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.[4]

Whether vagueness in the indictment has been cured by subsequent disclosure involves consideration of the following factors: the consistency, clarity and specificity with which the material fact is communicated to the Accused;[5] the novelty and incriminating nature of the new material fact;[6] and the period of notice given to the Accused.[7] Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must

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[4] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 27. See *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197-98. Cf. *Bizimungu et al.*, Decision on Prosecution Interlocutory Appeals Against Decision of the Trial Chamber on Exclusion of Evidence (AC), 25 June 2004, para. 18 ("Further, in finding that the failure to plead could not be remedied by the Pre-Trial Brief, disclosed witness statements or the Prosecution's opening statement, the Trial Chamber made specific reference to the jurisprudence of the Appeals Chamber").

[5] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 221-222 (disclosure in a witness statement of an allegation not mentioned in the pre-trial brief did not provide the "timely, clear and consistent" notice required to cure a defect in the indictment because "the [Accused] could well have concluded from the failure to mention Kivumu in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe"); *Ntakirutimana*, Judgement (AC), para. 111 (Trial Chamber erred in basing conviction on a particular incident where it was alleged that the Accused was present during an attack, but without precisely specifying the location, date, or his conduct: "the information available to [the Accused] before trial, however, provided no notice of the location of the event, contained a date that the Trial Chamber found was inaccurate, and did not allege that [the Accused] had pointed out refugees to attackers during the event"); *id.*, para. 57 (a single, somewhat ambiguous reference in a pre-trial brief provided inadequate notice of a new material fact when the testimony of five other witnesses was also used at trial to prove the material fact); *Kamuhanda*, Judgement (AC), 19 September 2005, paras. 25-26 (disclosure in witness statement and pre-trial brief of precise commune in which weapons had allegedly been distributed provided sufficient information to the Accused, even though the Indictment itself identified only the prefecture).

[6] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 95-98 (Trial Chamber erred in considering allegation of killing by the Accused of a specific named individual where only the general attack in which the killing took place had been mentioned in the pre-trial brief and witness statement); *id.*, para. 75; *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 20 ("The Defence cannot be considered to be on notice of any and all possible orders to a witness in a specific location merely because there is notice that the witness is alleged to have been under the command of the Accused and was at that location. Here, the Defence for Ntabakuze has no notice of the killings of the fifty civilians in hiding in Remera; no notice that he gave the order that they be killed; and, indeed, no notice that he issued any particular order at all at that location. The nature of the criminal conduct alleged is at least arguably changed from one of superior responsibility for killings at roadblocks by subordinates, to a direct order to kill fifty individuals. The Defence's need to rebut the charge is substantial; and its ability to do so is seriously impaired in the absence of meaningful advance notice").

[7] Disclosure four days before trial, and eleven days before the testimony, that an accused had been armed and fired upon victims during an attack, was not timely, particularly because the Prosecution had the statement in its possession two months prior to the disclosure. Previous disclosure in the pre-trial brief of the Accused's participation in the attack, but without mentioning his specific involvement in the violence, provided insufficient notice. *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 82-84; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 29.

convey that the material allegation is part of the case against the Accused.[8] This rule recognizes that, in light of the volume of disclosure by the Prosecution in certain cases, a witness statement will not, without some other indication, adequately signal to the Accused that the allegation is part of the Prosecution case. The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case.[9]

4. In its responses, the Prosecution maintains that the motion is either moot or premature: either the admissibility of the evidence has been decided by the Chamber in its rulings during the testimony of the witnesses; or, alternatively, the significance of testimony requires an assessment of its inter-relationship with other testimony at the end of the case, when all the evidence can be weighed and viewed in context.[10] Furthermore, the Chamber's decision on the Defence motions for acquittal is said to have disposed of the present motion.

5. In the Chamber's opinion, the motion is neither moot, nor premature, nor previously decided. Rulings in response to contemporaneous objections by the Defence were, as is clear from the transcripts, provisional.[11] The Chamber's decision on the motions for acquittal expressly stated that the adequacy of notice of charges was not within the purview of the Chamber's analysis under Rule 98 *bis*.[12] Although a Chamber may determine at the end of the case that a conviction cannot be sustained on the basis of material allegations of which the Defence had insufficient notice, this does not displace the obligation to determine

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[8] Ntakirutimana, Judgement (AC), 13 December 2004, para. 27 ("'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial") (citations omitted); *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197.

[9] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 196 ("[A] Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response"). This does not, however, foreclose the Trial Chamber's discretion to reject allegations which radically alter the indictment, even if the Defence has a reasonable opportunity to investigate the charge. *Gacumbitsi*, Judgement (TC), 17 June 2004, para. 188 ("Consequently, the Chamber finds that the Indictment does not contain any specific allegation about the murder of Kanyogote and his children. That the Prosecutor mentioned the murder of Kanyogote and his children in his Pre-Trial Brief is not such as to cure the vagueness in the Indictment, especially as such brief does not establish a link between the new allegation and paragraph 33 of the Indictment. The Pre-Trial Brief does not seek to render the Indictment more specific, but rather alters the Indictment substantially by either changing the identity of the victims referred to in paragraph 33 or including a new allegation of murder. The Pre-Trial Brief cannot be used as an instrument to amend the Indictment substantially").

[10] The Prosecution responses submit that the motion duplicates the relief already sought by the Defence in their motions to dismiss, filed under Rule 98 *bis*, and decided by the Chamber on 2 February 2005.

[11] T. 9 September 2003, pp. 9-10, concerning Witness XAI: ("For the time being we note what you said, Mr. Degli. Can we move on now? I know that you may be filing a motion on this"); T. 4 May 2004, p. 59, concerning Witness XXH ("It seems to me that this is something the parties will have to come back to at a later stage. So, your observation is noted, and your explanation is noted for the time being, Mr. White, but I don't think we can take this further now"); T. 11 October 2004, p. 16, concerning Witness XXQ: ("We have noted the objection of Mr. Tremblay, but leaving aside now the ultimate ruling on that issue, what we can see now is that on that page to which reference has been made there is information about Burundi and Rwanda. And that's where we are for the time being, and we may hear further arguments on this later on. Now, based on this preliminary ruling could you then continue your answer Mr. Witness?"). An objection to Witness DCH's testimony was interposed immediately after it had been said in court. The Prosecution asked no further questions concerning the incident and the Chamber did not at the time rule on the admissibility of the evidence. T. 18 June 2004 pp. 34-35. The Defence made a contemporaneous objection to Witness AAA's testimony, which the Chamber rejected on the basis of brief submissions by the parties. T. 14 June 2004 pp. 18-20.

[12] *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 7 ("The inquiry under Rule 98 *bis* is limited to determining whether "the evidence is insufficient to sustain a conviction". The Chamber is not mandated to consider whether the Defence has had insufficient notice of charges to sustain a conviction, or whether there are other legal defects in an Indictment which could lead to acquittal").

admissibility of evidence during trial.[13] If the Prosecution fails to establish the relevance of evidence to a charge against the accused, then it must be deemed inadmissible.

6. The Defence is expected, however, to make a timely objection to evidence whose admissibility it challenges. Failure to do so, particularly on grounds of lack of notice of a material allegation, deprives the Prosecution of the opportunity to make a motion for an adjournment or amendment of the indictment.[14] Failure to make a contemporaneous objection does not constitute an absolute waiver of the rights of the Accused, but shifts the burden of proof to the Accused to show that lack of notice has been prejudicial.[15]

7. A ruling by the Chamber in response to a timely objection during a witness's testimony does not foreclose a subsequent written motion. In light of the complexity sometimes associated with determining whether adequate notice of a material fact has been given, the Chamber's oral decision during a witness's testimony cannot be taken to foreclose any further objection. Although it is true that the Chamber has in the past expressed its inclination to address exclusion of evidence on the basis of notice at the end of the case, there is no reason to preclude written motions at an earlier stage.[16] Now that the Prosecution case is closed, the Chamber has a clearer idea of the possible relevance of the challenged evidence than it did when the objections were made. Furthermore, the Appeals Chamber has now substantially clarified the law concerning vagueness of indictments and notice of material facts. Where the Chamber can be satisfied that the evidence in question cannot not be relied upon as a basis for conviction, then the interests of judicial economy are served by deciding in advance that the evidence should be excluded.

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[13] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 196 ("A Trial Chamber ... should take one or more of the steps envisioned by *Kupreškić*, including excluding the evidence or ordering the Prosecution to move to amend the indictment"); *Bizimingu et al.*, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence (AC), 25 June 2004 (upholding Trial Chamber's decision to exclude evidence during the course of the trial by reason of vagueness of the indictment).

[14] *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 24 ("As previously mentioned, evidence whose reliability cannot adequately be tested by the Defence cannot have probative value. Once the sting of prejudice has been removed, as by giving the Defence adequate time to investigate and prepare for the new evidence, then the evidence can be admitted. The Chamber is of the view that it is preferable to hear relevant evidence, but will only permit admission of such evidence when there is a reasonable opportunity to evaluate the probative value of the evidence in conformity with the rights of the Accused"); *Niyitegeka*, Judgement (AC), 9 July 2004, para. 199 ("In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced") (emphasis added); *Bizimungu et al.*, Decision (TC), 23 January 2004, paras. 17-18.

[15] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 200 ("The importance of the accused's right to be informed of the charges against him under Article 20 (4)(a) of the Statute and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal ... an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired"); *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 29 ("When raised at the end of trial, the Defence has the burden of showing that its preparation was materially impaired by the defect in the indictment, notwithstanding any curative disclosure of the Prosecution case"). Although the objections in these cases were raised on appeal and at the end of the trial, respectively, the same logic applies to any objection after the opportunity to adjourn the witness's testimony has passed.

[16] T. 30 June 2003 pp. 57-59 ("And it is clear from those judgements [in *Ntakirutimana* and *Niyitigeka*] and it follows from the transcripts in those cases that on various occasions the Defence argued that the witness came with unexpected evidence and that it had to be excluded. And the Chamber, in these two cases, did not accept that point of view toward the evidence, but in the judgement, quite a few events having occurred in this way did not lead to conviction, but resulted in acquittal ....")

8. Timely objections were raised during the testimony of Witnesses XAI, XXH, XXQ, DCH, and AAA in respect of each of the items raised in the motion. Accordingly, the burden rests with the Prosecution to show that the material facts to which this evidence is relevant were adequately communicated to the Defence. Although the Prosecution has not offered detailed written submissions concerning the adequacy of notice in response to the written motion, it did make such submissions orally while the testimony was being heard.

(a) Witness XAI

9. The Defence challenges the admissibility of evidence that (i) as commander of operations in the Byumba area in 1992, Mr. Kabiligi gave a speech to soldiers under his command in which he warned of RPF infiltrators dressed as civilians and encouraged the soldiers to be "vigilant so that the infiltrators can be captured";[17] and (ii) that three infiltrators were subsequently arrested and killed on the orders of a company commander who, implicitly, acted on the orders of the Accused.[18] The Pre-trial Brief states that Witness XAI would testify that the Accused "would tell the FAR soldiers that RPF's troops were comprised of Tutsi and that Tutsi civilians who were their accomplices should be treated the same way".[19] The witness's statement alleges that the Accused said that "the RPF was composed of Tutsis and that Tutsi civilians who were their accomplices should face the same fate".[20]

10. Although the Pre-trial Brief and witness statement are somewhat vague, notice was at least given that the Accused had given instructions about capturing RPF infiltrators. As the testimony is generally related to that topic, and is not highly incriminating, notice was sufficient to render it admissible. The killing of the specific civilians, however, is an entirely different matter. This is a well-defined incident of killing, allegedly on the instructions of the Accused, which is highly prejudicial. The Prosecution has not shown that there is any reference to this incident in the witness's prior statement or the Pre-trial Brief. The lack of notice renders the testimony of the alleged killings of the three civilians inadmissible.

(b) Witness XXH

11. The Defence challenges six distinct elements of testimony concerning the conduct of the Accused in Cyangugu prefecture. The Pre-trial Brief gives notice of four of these, namely: a meeting attended by President Sindukubwabo and others at which the Accused called for contributions for arms which would be distributed to civilians in order to pursue Tutsi; a meeting on 24 May 1994 at which the Accused collected funds for that purpose; the killing of Tutsi at a roadblock near Rusizi set up by the Accused and manned by soldiers and *Interahamwe*; and the killing of an army deserter, on the orders of the Accused. Essential notice of a fifth element, the distribution of fuel coupons to Yussuf Munyakazi, an alleged *Interahamwe* leader, was given in the Pre-trial Brief and the witness statement. The Pre-trial Brief states that the Accused distributed such coupons to the *Interahamwe*, and the statement

[17] T. 9 September 2003 pp. 3, 9.
[18] T. 9 September 2003 pp. 10 (lines 29-37) - 11 (lines 1-11).
[19] Pre-trial Brief, p. 140. The paragraph of the indictment to which this allegation relates is not defined in the Pre-trial Brief with particularity, nor have specific submissions on this point been made by the Prosecution. An addendum to the Pre-trial brief identifies the testimony of Witness XAI as relevant to more than twenty-five paragraphs of the Indictments, some of which refer to killings of Tutsi civilians by soldiers. Prosecutor Pre-Trial Brief Revision (TC), 7 June 2002.
[20] Exhibit DK 25B, p. 3.

specifically names Munyakazi as one such recipient. Both the Pre-trial Brief and the witness statement were available to the Defence long before the witness's testimony.[21]

12. The testimony concerning a sixth element – that the Accused himself shot dead a suspected deserter – is not to be found in the Pre-trial Brief or the witness statement disclosed to the Defence.[22] As proof that the Accused killed a specified individual, the evidence could be prejudicial.[23] On the other hand, the Prosecution emphasized that this evidence is relevant only to "the ability and willingness of this particular Accused to effect disciplinary measures upon soldiers".[24] The Chamber is not satisfied, based on the submissions of the parties at this stage, that this testimony cannot be relied upon for lack of notice.

(c) Witness XXQ

13. The Pre-trial Brief gives clear notice of Witness XXQ's testimony that Mr. Kabiligi, during a meeting over which he presided in February 1994, rejected the Arusha Accords and outlined various "strategies to win the war", which included "to arm civilians and incite them to fight against Tutsi and moderate Hutu".[25] The testimony goes further, alleging that the Accused "told us that they had envisaged that war had to resume on the 23rd February", which was less than two weeks after the meetings. The witness elaborated that "this is a date that had been settled on, that had been fixed a long time before. It was the date on which the Rwandan government and the Burundian government had agreed to launch the genocide in the two countries".[26]

14. The allegation that the Accused was involved in fixing a specific date for the resumption of war, and that there was a conspiracy between the Rwandan and Burundian governments to initiate a genocide on that date, is not explicitly mentioned in the Pre-trial Brief. However, one of the witness's prior statements does say "it was resolved to resume war and put an end to the Arusha Peace Accords" during the meeting.[27] The significance of the witness's reference to an alleged decision concerning genocide requires further submissions by the parties. On the basis of the material presently available, the Chamber is not satisfied at this stage that no notice has been given.

(d) Witness DCH

15. After the witness referred during his testimony to the killing of refugees at Mburabuturo School by soldiers and *Interahamwe*, during which the Accused was alleged to

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[21] The addendum to the Pre-trial Brief refers the testimony of Witness XXH to paragraphs 6.43-6.48 of the Kabiligi Indictment.

[22] Although the objection to this testimony was somewhat vaguely articulated, Defence counsel did objectto the testimony in question saying that he believed that the witness had already described all of the incidents at the location in question. T. 4 May 2004, pp. 56, 58-59.

[23] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 74-76. The Appeals Chamber reversed the Trial Chamber's reference to a specific material fact based on the inadequacy of general allegations in the indictment. Though the Prosecution had not been negligent by failing to disclose the material fact in the indictment or elsewhere of which it was in possession, the Appeals Chamber nevertheless held that "the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual ... in cases concerning physical acts of violence perpetrated by the Accused personally, however, location can be very important ... When the Prosecution seeks to prove that the accused committed an act at a specific location, it cannot simultaneously claims that it is impracticable to specify that location in advance".

[24] T. 4 May 2004 p. 59.

[25] Pre-trial Brief, insert after p. 150. The paragraphs of the Kabiligi Indictment to which this testimony relates are said to be 5.1, 5.35, 6.31 and 6.32.

[26] T. 11 October 2004, pp. 13-14.

[27] Statement XXQ-1, p. 3 (disclosure dated 30 Jul 2003).

have been present, the Defence objected. Discussion of this question was interrupted by another matter, followed by an adjournment. When the examination resumed, the Prosecution elicited no further testimony on this incident.[28]

16. Neither the Pre-trial Brief nor the witness statements make any reference to the killing of refugees at Mburabuturo School, or the involvement of the Accused. The Prosecution argued orally that the incident may have been mentioned in the witness statements of Witness DH or Witness DY. Even assuming that notice by way of other witness statements could provide sufficient notice of a material fact, the Chamber has found no reference to the Mburabuturo School killings in those statements, or the presence of the Accused. The reference to the Mburabuturo killings in the witness's testimony is, accordingly, inadmissible.[29]

(e) Witness AAA

17. The Defence objects to the witness's testimony in respect of two alleged incidents. The first concerns Mr. Kabiligi telling *conseillers* of three sectors in Kigali that they must kill Tutsi, or Tutsi collaborators, whom he believed were moving about freely and assisting the RPF.[30] The second incident concerns an alleged promise by the Accused during a meeting presided over by the Prefect of Kigali to distribute weapons to assist with "security" and to "protect members of the population".[31]

18. No summary of Witness AAA's testimony appears in the Pre-trial Brief, as the witness was added to the Prosecution's list of witnesses after the commencement of trial. In the motion to amend the witness list, however, the Prosecution provided a summary of witness's testimony which describes the first alleged incident in detail.[32] This constituted sufficient notice of the material allegation. The second incident is not mentioned in the Prosecution motion, but was communicated in a detailed will-say statement provided to the Defence several days before the witness's testimony. The will-say elaborates upon a vague reference in a previous witness statement.[33] The incident is not highly incriminating, and the will-say and prior statement provide sufficient notice of the charge to make the testimony admissible.

(f) Witnesses in Respect of Whom No Contemporaneous Objection Was Made: ZF, XXY, LAI

19. The Chamber can find no record of a contemporaneous objection to the testimony of Witnesses ZF, XXY, and LAI which is now challenged.[34] As described above, where no such objection is made, the Defence bears the burden of showing that it has suffered prejudice due to lack of notice. The Defence has made no such submissions and has, accordingly, failed to meet its burden. This does not mean, however, that the Defence is precluded at a later stage

[28] T. 18 June 2004 pp. 33-35; T. 22 June 2004 pp. 21-24.
[29] T. 18 June 2004 p. 34 (lines 8-9).
[30] T. 15 June 2004, p. 3.
[31] T. 14 June 2004 p. 20.
[32] *Bagosora et al.*, Prosecution Motion (TC), 24 March 2004, para. 11. The paragraphs of the Indictment to which the witness's testimony relate have not been specifically identified by the Prosecution, as Witness AAA was added to the witness list after the Prosecution had filed its addendum to the Pre-trial Brief. Nevertheless, for present purposes, the Chamber accepts that the paragraphs of the Indictment which are described in the addendum to the Pre-trial Brief as relevant to the testimony of "all witnesses" (ie. paragraphs 5.1, 5.35, 6.31 and 6.32) may, similarly, be relevant to the testimony of Witness AAA.
[33] [Will say reference needed; Statement AAA-4, p. 7 (disclosed 24 March 2004).
[34] T. 28 November 2002 pp. 67-78 (ZF); T. 11 June 2004 pp. 3, 5 (XXY); T. 31 May 2004 p. 8 (LAI).

from proving that the absence of notice caused prejudice to the Accused which requires exclusion of the evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES inadmissible the portions of testimony of Witnesses XAI and DCH described above.

Arusha, 27 September 2005

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

[Seal of the Tribunal]