ICTR-98-41-T
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

28412
S. Musa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 29 June 2006

2006 JUN 29 P 6:35

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON NTABAKUZE MOTION FOR EXCLUSION OF EVIDENCE

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

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

28411

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 Ntabakuze Defence "Motion for the Exclusion of Evidence of Allegations Falling Outside the Scope of the Indictment", filed on 28 March 2006; and the Addendum thereto, filed on 7 April 2006;

CONSIDERING the Ntabakuze Defence "Supplementary Notes on Jurisprudence", filed on 1 May 2006; the Prosecutor's Response, filed on 8 May 2006, and the Annex thereto, filed on 12 May 2006; and the Ntabakuze Reply, filed on 15 May 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Ntabakuze Defence requests that the Chamber exclude from its consideration seventeen categories of evidence, elicited from numerous witnesses, as irrelevant to the Indictment.[1] The Defence argues that the Chamber may not, consistent with the rights of the Accused and the rules governing indictments, base a conviction on any of these unpleaded matters. Notice of material facts other than through the Indictment is said to be exceptional, and not justified in the case of these seventeen categories of evidence. The Prosecution opposes the motion or, alternatively, requests that it be permitted to amend the Indictment to correct any deficiencies.

DELIBERATIONS

(i) Applicable Principles

2. The Chamber has previously addressed a similar motion in its Decision on Exclusion of Testimony Outside the Scope of the Indictment ("the Kabiligi Exclusion Decision").[2] The Chamber provided a framework for analyzing this type of motion, and discussed the relationship between the argument that evidence should be excluded on the basis of "lack of notice", and admissibility of evidence:

> 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." 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. Although the

[1] Motion, para. 57 ("The evidence is irrelevant and of no probative value in relation to the actual charges in the Indictment. Keeping it in the record creates great prejudice to the Accused Ntabakuze because evidence of the alleged criminal conduct, or other alleged improper conduct, for which he has not been charged, is 'similar fact evidence' or 'bad character evidence,' nothing more. The prejudicial effect of such evidence must outweigh its probative value, with respect to the acts alleged in the Indictment").

[2] *Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005.

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.

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". 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, *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.

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; the novelty and incriminating nature of the new material fact; and the period of notice given to the Accused. Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must convey that the material allegation is part of the case against the Accused. 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.[3]

As described above, "curing" is the process by which vague or general allegations in an indictment are given specificity and clarity through communications other than the indictment itself. Only material facts which can be reasonably related to existing charges may be communicated in such a manner.[4]

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[3] *Id.*, paras. 2-3 (citations omitted).

[4] *Naletilic*, Judgement (AC), para. 26 ("a Trial Chamber can only convict the accused of crimes which are charged in the indictment"); *Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (TC), 30 September 2005, para. 13 ("the process of curing an Indictment does take

3. The Appeals Chamber has specifically approved the use of curative materials by a Trial Chamber in assessing whether the Defence had sufficient notice of material facts.[5] The availability of curing at the Trial Chamber level was distinctly reaffirmed in the Appeals Chamber's most recent pronouncement on this question:

> In reaching its judgement, a Trial Chamber can only convict the accused of crimes which are charged in the indictment. If the indictment is found to be defective because it fails to plead material facts or does not plead them with sufficient specificity, the Trial Chamber must consider whether the accused was nevertheless accorded a fair trial. In some instances, where the accused has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him or her, the defective indictment may be deemed cured and a conviction may be entered.[6]

A Trial Chamber "may", but is not required to, consider whether an indictment has been cured. Accordingly, Trial Chambers which have declined to hear evidence concerning material facts outside of the indictment have done so either because they did not believe that the Defence had sufficient notice thereof, or because they exercised their discretion not to permit the addition of material facts.[7] These decisions do not contradict the principle that a vague indictment may, in appropriate circumstances, be cured through subsequent communications.[8]

4. Curing has been described as "exceptional" where the Prosecution knows of material facts at the time the indictment is filed, but fails to plead them.[9] No such characterization has been made in respect of material facts which are subsequently discovered. Indeed, the Appeals Chamber has suggested that it is not imperative that every material fact be pleaded in an indictment. In response to an interlocutory appeal by the Prosecution requesting reversal

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place only when the material fact was already in the Indictment in a certain manner, not when it was not included at all").

[5] *Ntakirutimana*, Judgement (AC), para. 101 ("The Trial Chamber concluded that sufficient information was given regarding this allegation to the summary of Witness SS's testimony in Annex B to the Pre-Trial Brief and one of SS's prior witness statements, which was disclosed on 7 February 2001. In the view of the Appeals Chamber, this conclusion was correct").

[6] *Naletilic*, Judgement (AC), para. 26.

[7] *See, e.g., Zigiranyirazo*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief (TC), 30 September 2005; *Ntagerura et al.*, Judgement (TC), 25 February 2004, paras. 29-39.

[8] *Cf., Bizimungu et al.*, Decision on Motion from Casimir Bizimungu Opposing to the Admissibility of the Testimony of Witness GKB, GAP, GKC, GKD and GFA (TC), 23 January 2004, para. 13 ("failure to include the facts in the Indictment cannot be cured by references to the Pre-Trial Brief"). Ntabakuze relies on the Appeals Chamber's failure to reverse this decision as confirming the correctness of this statement of law. The Appeals Chamber stated that "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". *Bizimungu et al.*, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence (AC), 25 June 2004, para. 18. In light of subsequent pronouncements by the Appeals Chamber, however, this statement cannot be understood as a repudiation of curing in general, and must be interpreted simply as an acceptance of the Trial Chamber's factual determination that, in the circumstances of that case, the Trial Chamber properly exercised its discretion. *See e.g. Naletilic*, Judgement (AC), paras. 26-27.

[9] *Ntakirutimana*, Judgement (AC), para. 125 ("The Appeals Chamber, having accepted many of the Appellant's complaints of a lack of notice resulting in prejudice, stresses to the Prosecution that the practice of failing to allege known material facts in an indictment is unacceptable and that it is only in exceptional cases that such a failure can be remedied, for instance, 'if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her'").

of a Trial Chamber decision denying an amendment of an indictment so as to add material facts, the Appeals Chamber commented:

> The Appeals Chamber does not accept the Prosecution's argument that the denial of the amendments will necessarily result in the exclusion of evidence that relates to charges contained in the current indictment. If evidence is relevant to a charge in the current indictment and is probative of that charge, then subject to any other ground of exclusion that may be advanced by the Defence, that evidence should be admissible.[10]

5. Allegations of physical perpetration of a criminal act by an accused must appear in an indictment.[11] On the other hand, "less detail may be acceptable if the 'sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes'".[12] Many acts attributed to an accused fall on the spectrum between these two extremes. Individual actions of an accused which contribute to crimes will require more specific notice than proof of the crimes themselves, where they are physically committed by others. The specificity of the notice required is proportional to the extent of the Accused's direct involvement.

6. Whether a defective indictment was cured depends on "whether the accused was in a reasonable position to understand the charges against him or her".[13] The presence of a material fact somewhere in the Prosecution disclosure does not suffice to give reasonable notice; what is required is notice that the material fact will be relied upon as part of the Prosecution case, and how.[14] In *Naletilic*, the Appeals Chamber distinguished between those sources of disclosure which are adequate, and those which are not:

> In assessing whether a defective indictment was cured, the issue to be determined is whether the accused was in a reasonable position to understand the charges against him or her. In making this determination, the Appeals Chamber has in some cases looked at information provided through the Prosecutor's Pre-Trial Brief or its opening statement. The Appeals Chamber considers that the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment, may in some cases serve to put the accused on notice. However, the mere service of witness statements or of potential exhibits by the Prosecution pursuant to disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial. Finally, an accused's submissions at trial, for example, the motion for judgement of acquittal, final trial brief or closing arguments, may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[15]

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[10] *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 55. There is no suggestion earlier in the decision that the Appeals Chamber is talking only about facts which fall below the threshold of materiality.

[11] *Ntakirutimana*, Judgement (AC), para. 32; *Kupreskic*, Judgement (AC), para. 89.

[12] *Naletilić*, Judgement (AC), para. 24; *Kupreskic*, Judgement (AC), para. 89.

[13] *Naletilić*, Judgement (AC), para. 27 (with references).

[14] *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (TC), para. 22 ("It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges").

[15] *Naletilic*, Judgement (AC), para. 27 (citations omitted); as for the significance of submissions at trial showing that the Accused's ability to prepare was not materially impaired, see *Kvocka*, Judgement (AC), paras. 52-54;

The Appeals Chamber has, in effect, established a distinction between the Pre-Trial Brief and opening statement, on the one hand, which are permissible ways of giving notice of material facts; and the "mere service of witness statements", which are not.

7. Objections play an important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against the accused. The failure to voice a contemporaneous objection does not waive the Accused's rights, but results in a shifting of the burden of proof:

> 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. The Defence may also file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation.
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> ...
>
> [A]n accused person who fails to object at trial has the burden of proving on appeal that his 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.[16]

This standard applies whenever the objection is not raised contemporaneously with the introduction of the evidence.[17]

8. The Defence argues that it has already objected, in two written motions in May and August 2002, to all of the impugned evidence. These motions challenged the inclusion of "new charges" in the Pre-Trial Brief. Furthermore, the Defence claims that it "did not see great utility in delaying proceedings by repeating the objection at every possible opportunity, which would not only have been pointless in light of the Chamber's ruling, but ran the risk of incurring the displeasure of the new Trial Chamber, and the President of the Tribunal".[18] However, the so-called "ruling" was simply a general remark by the Presiding Judge during an informal status conference that many issues concerning admissibility of documents could be addressed as arguments concerning the weight of the evidence rather than through time-consuming challenges to admissibility.[19]

9. The written motions in 2002 do not constitute a sufficient objection to any and all evidence which the Defence now characterizes as falling outside of the Indictment. As mentioned above, the Defence's obligation is to "interpos[e] a specific objection at the time the evidence is introduced".[20] The Defence's excuse of futility is contradicted by the frequent objections lodged by the Kabiligi Defence – and by the Ntabakuze Defence itself, on

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Kordic and Cerkez, Judgement (AC), para. 148; *Niyitegeka*, Judgement (AC), para. 198; *Kupreskic*, Judgement (AC), para. 122.

[16] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 199-200.

[17] *Ndindabahizi*, Judgement (TC), para. 29.

[18] Motion, para. 52.

[19] T. 13 June 2003 pp. 25-26.

[20] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 199.

occasion – of lack of notice.[21] These objections were entertained and considered impartially by the Chamber. Accordingly, to the extent that the Defence has pointed to no specific objection concerning the evidence in question, the presumption shall be that the burden rests on the Defence to show that the lack of notice has been prejudicial to its ability to understand and respond to the evidence in question.

10. The Chamber's approach in the sections which follow may be summarized as follows. Where a material fact cannot be reasonably related to the Indictment, then it shall be excluded. Where the material fact is relevant only to a vague or general allegation in the Indictment, then the Chamber will consider whether notice of the material fact was given in the Pre-Trial Brief or the opening statement, so as to cure the vagueness of the Indictment.[22] Material facts which concern the actions of the Accused personally are scrutinized more closely than general allegations of criminal conduct. Other forms of disclosure, such as witness statements or potential exhibits, are generally insufficient to put the Defence on reasonable notice. The Chamber recognizes two exceptions to this principle: first, where the Prosecution filed a motion for the addition of a witness, which was subsequently granted by the Chamber, and which stated the material facts on which the witness would testify (Witness AAA); second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts (Witness DBQ).[23]

(ii) Application: Specific Exclusion Requests Based on Lack of Notice

(a) Death Squads: AMASASU and Related Organizations

11. The Ntabakuze Defence seeks the exclusion of the testimony of Witnesses DCH, XAQ and ZF concerning the Accused's alleged involvement in death squads and AMASASU in 1992 and 1993.[24] The Defence raised a contemporaneous objection to the testimony of Witness DCH, but only on the basis of temporal jurisdiction, not notice.[25] Accordingly, the burden rests with the Defence to show that it was not in a reasonable position to understand and respond to testimony of these three witnesses.

12. Witness DCH testified that in 1992 and 1993, Ntabakuze was the leader of a clandestine group of soldiers called AMASASU within the Para-commando Battalion, which was "responsible for intimidating those who were opposed to the MRND".[26] Witness XAQ described the involvement of Corporal Munyankindi, a Para-commando soldier, in a death squad in 1992.[27] Witness ZF used a number of different names to describe communication networks and death squads:

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[21] *See Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005, para. 8 (confirming that objections to the admission of testimony were interposed in respect of portions of the testimony of Witnesses XAI, XXH, XXQ, DCH and AAA).

[22] The Chamber shall in one case also rely on the materials supporting the Indictment itself. *Infra* para. 13.

[23] *Infra* paras. 44 (Witness AAA), 27-29 (Witness DBQ).

[24] Motion, paras. 60-68.

[25] T. 23 June 2004 pp. 45, 46, 49. Given the link that allegedly existed between the AMASASU and other clandestine organizations which may have continued their activities into 1994, the Chamber concluded at the time that the evidence regarding the AMASASU was relevant to events in 1994 and should therefore be heard. T. 23 June 2004 pp. 52, 53.

[26] T. 23 June 2004 pp. 45, 50-53.

[27] T. 23 February 2004 pp. 17-19. The Defence also objects that this evidence of Munyankindi's alleged membership in a death squad is inextricably linked to evidence which the Chamber has decided to exclude from this trial, namely the alleged involvement of the Accused in death squads linked to the attempted abduction of Prime Minister Nsengiyaremye in October 1992. However, whether the Accused was involved in death squads

> The zero network was a communications network. The death squad – rather, death squads, were small groups apparently of well-trained people who were in charge of executing the decisions of the members of these networks, while the dragons were supposed to be the names of these groups, the groups that were the masterminds – I do not know whether this word is the appropriate word – the groups that were behind those activities, that is, anti-enemy activities, activities directed against the accomplices. The groups were secret groups, closely-knit groups. The Abakozi was another name synonymous to dragon. The dragons and Abakozi meant the same thing.[28]

13. The Indictment makes no mention of these groups by name, but paragraphs 1.13 to 1.16 do refer to "prominent civilian and military figures", sharing an "extremist Hutu ideology", working together from as early as 1990 to pursue a "strategy of ethnic division and incitement to violence". Their strategy included "the preparation of lists of people to be eliminated" and "the assassination of certain political opponents".[29] The Indictment was accompanied by a document entitled "Supporting Materials" which consists of specific and focused excerpts from statements of prospective witnesses in relation to each paragraph of the Indictment. This document does not constitute a massive disclosure and would have provided the Defence with a clear indication of the material facts which it would present in relation to each paragraph of the Indictment. In relation to paragraph 1.12, an expert witness is quoted as 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)".[30]

14. On this basis, the Chamber finds that the Accused was reasonably informed that this material fact was part of the case against him.

(b) Arrests in October 1990 Using Lists

15. The Defence objects to testimony of Witnesses DBQ and DBY that lists were used by Para-commando soldiers in 1990 to arrest Tutsi and perceived accomplices of the enemy.[31]

16. Paragraph 5.1 of the Indictment names Ntabakuze as part of a group of persons who, "[f]rom late 1990 until July 1994", devised a plan consisting of "among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated" (emphasis added). The Accused clearly had notice of this material fact. The suggestion that the evidence cannot be relevant to any crime committed during the temporal jurisdiction of the Tribunal has already been specifically rejected by the Chamber, and no grounds justifying review of that decision have been presented in the motion.[32]

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in general is very different from the allegation that he was involved in a 1992 event where a death squad may have been sent to abduct the former Prime Minister. The evidence is not inadmissible on this basis.

[28] T. 27 November 2002 pp. 67-68.

[29] Indictment, para. 1.15.

[30] Supporting Materials, p. 13 (report of André Guichaoua).

[31] Motion, paras. 69-72.

[32] *Bagosora et al.*, Decision on Proposed Testimony of Witness DBY (TC), 18 September 2003, para. 27 ("However, the Chamber accepts item (c) [concerning the use of lists during arrests in 1990] 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 evidence in context").

(c) Orders by Accused to Para-commando Battalion at an Assembly at Camp Kanombe, 6 or 7 April

17. The Defence objects to the testimony of nine witnesses placing him at an assembly of soldiers at Camp Kanombe on either 6 or 7 April 1994, where he is alleged to have issued orders to kill civilians and made other incriminating statements.[33] Witnesses XAP, XAQ, XAI, and DBQ recalled this assembly occurring on the night of 6 April; Witnesses XAB, DP, BC, LN and DBN said that it happened on the morning of 7 April. Paragraph 6.27 of the Indictment gives a different date for the event:

> On 8 April 1994, at a general assembly, the Commander of the Paracommando Battalion, Aloys Ntabakuze, ordered his soldiers to "avenge the death of President Habyarimana by killing the Tutsi". Further, he encouraged his troops by confirming that certain Tutsi and their "politician accomplices" had been killed. Indeed, several opposition leaders had been assassinated the previous day.

The Defence argues that the evidence is outside the scope of the Indictment. No latitude should be granted for such an error as the testimony concerns acts of the Accused himself.

18. There is undoubtedly a discrepancy between the date in the Indictment and the dates in the Pre-Trial Brief summaries, which give the date of the assembly attended by the Accused as either the night of 6 April or the morning of 7 April.[34] A cursory review of the summaries, however, would have revealed this discrepancy and revealed that, regardless of the date, paragraph 6.27 is alleging the same event as is mentioned in the summaries. Four of the summaries (of Witnesses DBN, XAB, XAP and XAQ) describe the Accused specifically instructing the soldiers to "revenge" the death of the President, which is the exact sentiment attributed to the Accused in paragraph 6.27. None of the summaries suggest that there was more than one meeting of this nature. Rather than being "buried under a great mass of pre-trial disclosure", as is suggested by the Defence, the discrepancy would have been obvious from reading the Pre-Trial Brief itself.[35] This is not to say that the Prosecution should not have corrected the error once it was discovered; nonetheless, the Chamber is satisfied that, based on the material before it, the Defence would have been aware of the erroneous date in the Indictment, and of the actual dates to which the witnesses would testify the event occurred. The Defence had reasonable notice of the material fact on which the Prosecution would rely, despite the discrepancy between the Indictment and the Pre-Trial Brief summaries. Accordingly, the evidence is not excluded.

(d) Massacres in Akajagali

19. Ntabakuze objects to the testimony of nine witnesses concerning alleged massacres by Para-commando soldiers in the neighbourhood of Akajagali, near Camp Kanombe, soon after the assembly described in the previous section.[36] Witnesses XAP, XAQ, XAI, DBQ and DBN gave testimony of their observations of these events. Witnesses GS and XXJ described visiting Akajagali on the morning of 7 April, and seeing indications of these massacres by Para-commando soldiers. Witness XAB recalled hearing gunshots during the night of 6 April

[33] Motion, paras. 73-87.
[34] The only witness whose summary places the event on 8 April 1994 is Witness LN.
[35] Defence Motion, para. 87.
[36] Motion, paras. 88-94.

1994 in Akajagali, from which he inferred that a unit of the Para-commando Battalion was involved in killings. Witness XXY claimed to have heard of civilian killings in the area around Camp Kanombe.

20. Paragraph 6.36 of the Indictment alleges that "starting on 7 April in Kigali ... elements of the Presidential Guard, Para-commando Battalion and Reconnaissance Battalion murdered political opponents. Numerous massacres of the civilian Tutsi population took place in places where they had seek [sought] refuge". The Pre-Trial Brief summary for Witness DBQ states that immediately following the assembly at which Ntabakuze had given orders to eliminate the enemy, he sent a company of soldiers to "Kajagali", where they proceeded to kill civilians. Witness DBN's summary refers to killings around Camp Kanombe immediately after the assembly of soldiers on 7 April. Killings of Tutsi "around the President's residence" on 7 April are also mentioned in Witness GS's summary. In light of these and other indications in the Pre-Trial Brief, the Accused had reasonable notice of the allegations against him and their connection to the Indictment.[37]

(e) Meetings of Officers in Camp Kanombe

21. The Defence objects to the testimony of several witnesses who alleged that Ntabakuze attended meetings with Colonel Bagosora or others at Camp Kanombe after the crash of the Presidential plane on 6 April.[38] Witness DBQ testified to two meetings of Ntabakuze with Bagosora on 6 and 7 April 1994,[39] while Witness DBN described one on 8 April 1994. Witness LN testified to meetings of military officers, including Ntabakuze and Bagosora, on 6 and 7 April at the Kanombe Hospital and at Army Headquarters, respectively. Witness GS gave testimony that on the night of 6 April, Ntabakuze met with Major Ntibihora and Lt. Colonel Baransalitse and made certain anti-Tutsi statements.[40] No contemporaneous objection was made.[41]

22. Though the Indictment makes no mention of these meetings, the Pre-Trial Brief summary for Witness LN states that, on the night of the plane crash:

> [a]round midnight, Corporal MASITUMU ... told the witness that a meeting chaired by Colonel BAGOSORA was taking place inside the hospital, with the attendance of Lt. Colonel BARANSARITSE; Major NTABAKUZE; Major NTIBIHORA; Major MUTABERA.[42]

[37] Pre-Trial Brief summary for Witnesses XAQ ("Witness started hearing gunshots that night [April 6th] after soldiers from the Para Commando Battalion left the camp [Kanombe] with arms and ammunitions"), XAP ("In the morning [of April 7th] the witness saw soldiers coming back in the camp with looted items. A colleague informed witness that many Tutsi had been killed, including witness's cousin and her two children."), and XAI ("[On April 6th] Witness heard Major Ntabakuze ... [ordering soldiers] ... to go in various areas of Kigali, with the mission to kill the Tutsi and their accomplices .... On 7 April 1994, a colleague informed witness that Major Ntabakuze ordered his soldiers to resume the massacres during the night ...").

[38] Motion, paras. 95-103.

[39] T. 23 September 2003 pp.15-17 (concerning 6 April); T. 31 March 2004 p. 77 (relating to 7 April).

[40] T. 17 February 2004 p. 42.

[41] A contemporaneous objection was made by the Kabiligi Defence to the evidence of Witness DBQ, but only on the basis of lack of notice concerning a meeting on 6 April 1994 attended by Ntabakuze, Bagosora and others. T. 23 September 2003 p. 17.

[42] Pre-Trial Brief, p. 6558.

The summary for Witness DBQ indicates that on 6 April "Ntabakuze came back [to Camp Kanombe] around 23h. Then he went into a meeting with the officers at the camp".[43] These references provided a reasonable indication of the evidence.[44]

(f) Failing to Punish Nzabonariba and Handing Nyabyenda Over to *Interahamwe*

23. Ntabakuze objects to testimony by Witnesses DBN, XAP, LN and XAB concerning his alleged failure to punish one of his subordinates, Second Lieutenant Sylvestre Nzabonariba, for killing a Tutsi soldier.[45] Witness XAP also alleged that Ntabakuze handed a soldier named Nyabyenda to the *Interahamwe* to be killed for having protected Tutsi. No general or specific reference to this event is to be found in the Indictment or the Pre-Trial Brief. The event is described in the written statements of Witnesses XAP, LN and XAB.

24. The Prosecution responds that these incidents "do not constitute material facts of the prosecution case" and that they "do not go to any specific crime charged in the indictment".[46] Instead they were adduced to "to prove other facts at issue", in particular the "prevailing situation within the Para-commando Battalion" and the "state of mind of the soldiers of the Para-commando Battalion".[47] The Prosecution also argues that notice was given through disclosure of witness statements and that any claim of prejudice is contradicted by Defence submissions in its Pre-Defence Brief, in particular the summaries of Witnesses DH-51 and DH-62, which correctly identifies and contradicts this incident.[48] The Prosecution's argument may be understood to mean that the evidence should be considered admissible only in respect of the criminal conduct of the Para-commando soldiers, not the Accused himself.

25. The Chamber finds that for the purpose of demonstrating criminal conduct by Para-commando soldiers, the evidence is admissible. The general allegation concerning the criminal conduct of Para-commando soldiers in Kigali would encompass the incident described by these witnesses. The Defence registered no contemporaneous objection to the evidence on the basis of lack of notice and, accordingly, now bears the burden of showing that it was not in a reasonable position to understand the nature of the allegations being made by the witness, and that it suffered prejudice as a result.[49] That burden has not been discharged. For the purpose of showing the criminal conduct of soldiers of the Para-commando Battalion, the evidence is admissible. Based on the Prosecution's own submissions, the Chamber accepts that the evidence is not admissible, however, in respect of specific orders or knowledge of the Accused.

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[43] Pre-Trial Brief, p. 6608.

[44] The Ntabakuze Defence itself suggests that there may be *non-incriminating* explanations for these meetings. Referring to Witness DBQ's testimony of a 1a.m. meeting in Ntabakuze's office, including Colonel Bagosora and other officers, the Defence writes, "there is no evidence of any relationship between this meeting and alleged criminal conduct, since all involved were military officers with legitimate reasons to confer following the apparent assassination of the President." Defence Motion, para. 97.

[45] Motion, paras. 104-111.

[46] Response, paras. 62-63.

[47] Prosecution Response, para. 63.

[48] Prosecution Response, paras. 65-66.

[49] The Ntabakuze Defence did make an objection during the testimony of Witness LN as regards the shooting of Nzabonariba, but did not interpose a specific objection on the basis of notice to the general evidence of criminal conduct by Para-commando soldiers. T. 30 March 2004 p. 67 ("Mr. President, in the statement of the witness, Witness LN, the incident being testified to by the witness at present, that incident covers five lines, not more than five lines. And the time devoted to the examination-in-chief is totally disproportionate to the five lines that appear in the statement.")

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(g) Rape

26. The Defence argues that it had no notice of allegations by Witness DBQ that Para-commandos committed rape about fifty metres from IAMSEA, in Kajagali, and at the Christus Centre in April and May 1994, and by Witness XAB that such rapes were committed at Sobolirwa on or before 12 April 1994.[50] The Prosecution responds that the Chamber's Decision on Admissibility of Evidence of Witness DBQ, dated 18 November 2003 ("the DBQ Decision"), has already addressed the question of notice of these allegations. The Defence replies that the issue in that decision was only the admissibility of the evidence, not whether the Indictment could be informally amended.

27. The DBQ Decision squarely addressed the sufficiency of the Indictment and whether any vagueness had been cured by subsequent communications to the Defence. The DBQ Decision starts by analyzing the Indictment itself, finding that there were "broad allegations of criminal conduct throughout Kigali and the rest of Rwanda, including direct and superior responsibility for massacres and rapes".[51] Paragraph 6.47 of the Indictment is quoted as saying that "rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda ... perpetrated by, among others, soldiers, militiamen and gendarmes ...". The Chamber proceeded to consider whether subsequent notice had cured this general allegation in the Indictment. Notice could be provided "in the Prosecution Pre-Trial Brief, opening statement or witness statements".[52] Having found no references to Witness DBQ's specific allegations of rape in the Indictment or Pre-Trial Brief, the Chamber held that the will-say statements could provide adequate notice of the allegations, as long as the witness's appearance was postponed for a significant period.[53]

28. Since the DBQ Decision, the Appeals Chamber has held that "'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".[54] On the other hand, those same Appeals Chamber decisions have affirmed that where "the evidence turns out differently than expected", the possible remedies include "amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment".[55] This would seem to suggest that notice of a material fact may be conveyed through a witness statement, such as a will-say, provided that it is coupled with "an adjournment" of sufficient duration to allow the Defence to meet the charge. The key question is whether the Defence had clear and unambiguous notice that the material fact would be relied upon as part of the Prosecution case, and had sufficient opportunity to respond to the charge.

29. Although the law on notice may have shifted slightly since the DBQ Decision was rendered, the Chamber nevertheless finds that its conclusions were sound and that the Defence had adequate notice of these material facts. Not every new material fact need be incorporated into the indictment or excluded: a third option, as expressly recognized by the

[50] Motion, paras. 112-118.
[51] DBQ Decision, para. 15.
[52] DBQ Decision, para. 12.
[53] DBQ Decision, para. 11 ("Given the number of new incidents raised in the will-say statements, the seriously incriminating nature of the conduct alleged, and the remoteness of the new factual allegations from any incidents of which the Defence had notice, the Defence needed more time to be prepared than remained in that trial session").
[54] *Ntakirutimana*, Judgement (AC), para. 27; *Naletilic*, Judgement (AC), para. 27.
[55] *Ntakirutimana*, Judgement (AC), para. 26; *Naletilic*, Judgement (AC), para. 25.

Appeals Chamber, is adjournment. As long as the Defence has unambiguous notice that the Prosecution proposes to rely on the new material fact, and that the adjournment is granted to give the Defence an opportunity to defend against the new material fact, then the fairness of the trial is preserved without sacrificing a reasonable measure of flexibility which can be important in lengthy and complex trials. Although no request was made to amend the Indictment, the Chamber exercised judicial control over the addition of these new material facts to the Prosecution case. The DBQ Decision carefully considered the relevance of the new material facts to the Indictment; its significance to the charges in the Indictment; the possible prejudice to the Accused; and the length of the adjournment which would be required.

30. Under these circumstances, and for the reasons more fully set out in the DBQ Decision, the material facts concerning rape, as introduced through Witness DBQ, are properly admissible as relevant to the Indictment.[56] The DBQ Decision was specifically concerned with the admission of material facts through that witness, on the basis of the disclosure and the specific submissions by the Prosecution in relation to that witness.

31. The Chamber did not, by virtue of the DBQ Decision, authorize the admission of Witness XAB's testimony. The Defence, having failed to cite any contemporaneous objection to the testimony of Witness XAB, bears the burden of showing that it was not in a reasonable position to understand the charges and that it was materially impaired in its preparations.[57] The Defence argues that the failure to plead these material facts in the Indictment or other materials deprived it of notice, and that the facts alleged are incriminating of the Accused. The Prosecution made no submissions in response, other than relying on the DBQ Decision, to show that the Defence had notice of this evidence and was not materially impaired in its preparation. The Chamber finds that the Defence has discharged its burden, and that the evidence must be excluded.

(h) Killings By Para-commando Soldiers at IAMSEA, Remera, Kabeza and Environs

32. The Defence claims that Ntabakuze had insufficient notice of the testimony of seven witnesses concerning killing of civilians in Kigali by Para-commando soldiers, in particular at IAMSEA, Remera, and Kabeza.[58]

33. Paragraph 6.36 of the Indictment is, in itself, too vague to give sufficient notice of these events. It describes "elements of the Rwandan Army" committing massacres "in Kigali", and to the "Para-Commando Battalion" murdering political opponents. This vagueness is cured, however, by repeated references in the Pre-Trial Brief to specific crimes by Para-commando soldiers in and around Kigali. Witness XAB's summary refers to involvement by a Para-commando unit in massacres at Kicukiro. Killings at Kabeza are mentioned in Witness AH's summary, which also indicates that the witness met Ntabakuze

[56] The Chamber emphasizes that the disclosure of the will-say statements alone would not, in principle, be sufficient to put the Defence on notice of these new material facts. In the particular circumstances of Witness DBQ's testimony, however, the Defence did have sufficient notice because of, among other factors: the judicial oversight exercised by the Chamber; the unequivocal and specific submissions from the Prosecution as to the nature and use of the material facts; and the express purpose and duration of the adjournment which was granted.

[57] Motion, paras. 112-118; T. 6 April 2004 pp. 34-40. An objection was interposed concerning killings at IAMSEA, but not the nearby rapes.

[58] Motion, paras. 119-128.

on 8 April near Kabeza while "his troops were searching for and killing civilians". The Accused is alleged in Witness DBQ's summary to have told his men that "the enemy was there just outside the camp and that they should go and eliminate the enemy". One company of soldiers was sent to Kajagali, Kabeza, and Remera, respectively, and the soldiers went "house to house, checking ID's and any mention of Tutsi meant immediate death". Witness XAP's summary speaks generally of soldiers returning to the camp after looting and killing, implying that they were returning from the nearby neighbourhood of Remera.

34. The summary of Witness WB gives a detailed description of the killings at IAMSEA including the presence and orders of the Accused. The events at IAMSEA and conduct of Ntabakuze are also part of the DBQ Decision, whose significance was discussed in the previous section.[59]

35. Accordingly, the Chamber finds, on the basis of the Pre-Trial Brief and the DBQ Decision, that the Accused had timely, clear and consistent notice of these events and that he was in a position to reasonably understand that these material facts were relevant to paragraph 6.36 of the Indictment.

(i) ETO Refugees at Sonatube Intersection

36. The Defence objects to testimony that Para-commando soldiers at Sonatube intersection, in Ntabakuze's presence, re-directed refugees who were fleeing from the *Ecole Technique Officielle* ("ETO") towards Nyanza, where they were later killed.[60] Alison Des Forges' testimony indicated that the Accused was at Sonatube during the event.[61] Witnesses AFJ and Ruggiu gave evidence that Ntabakuze ordered his soldiers at Sonatube to send the refugees back to ETO.

37. Paragraph 6.19 of the Indictment states that Para-commandos in Kigali "set up roadblocks, reinforced with armoured vehicles, on the major roads, controlling people's movements". Paragraph 6.34 refers to Kigali as the place where the "elite units of the Rwandan Army were based" and that, consequently, "several of the military and civilian figures who had planned and organized the massacres played a leading role in carrying out the massacres in Kigali". Paragraph 6.37 alleges that on 11 April, "soldiers, including elements of the Presidential Guard, and *Interahamwe* rounded up a group of refugees [from ETO] and moved them to Nyanza", where they were massacred. The summary of Witness XAB's testimony in the Pre-Trial Brief says that he was "told by elements of CRAP that they had taken part in massacres at the Ecole Technique Officielle".[62]

38. Although the Indictment is perhaps not as crystalline as it could be in relation to this event, the Chamber finds that the notice provided by the Indictment and Pre-Trial Brief was sufficient. Paragraph 6.37 does not mention Para-commando soldiers by name, but the reference to "soldiers" includes Para-commandos. The inclusive reference to Presidential Guard soldiers does not exclude Para-commando soldiers, particularly in light of other paragraphs of the Indictment, including paragraph 6.19, which indicate clearly that the Para-commandos were in Kigali at this time, and that they committed crimes. The reference in the Pre-Trial Brief would have made it clear that the "soldiers" in paragraph 6.37 of the

[59] DBQ Decision, para. 16.
[60] Motion, paras. 129-138.
[61] T. 18 September 2002 p. 54.
[62] Prosecution Response, para. 103.

Indictment included Para-commandos. The failure to assert a contemporaneous objection may suggest that the incident was not as surprising as the Defence now claims. In any event, in the absence of such an objection, the Defence bears the burden of showing that it was not in a reasonable position to understand the material facts. In the Chamber's view, this burden has not been discharged by the generalized claims of lack of notice and prejudice. For these reasons, the exclusion of the evidence is not justified.

(j) Kabuga Mosque, Ruhanga Church and Masaka Incidents

39. Witness DCH's testimony describing the involvement of the Accused and Para-commando soldiers in killings at the Mosque and Brigade of Kabuga in June 1994, and at Ruhanga Church in April 1994 is challenged for lack of notice.[63] The Defence also objects to the testimony of Witness DBN describing a platoon of soldiers being sent to kill Tutsi at Masaka at the request of Anatole Nsengiyumva. The events are said to fall outside the scope of the Indictment, which mentions none of these locations by name.

40. Paragraph 6.36 of the Indictment refers generally to Para-commando soldiers massacring Tutsi at places where the latter had sought refuge. The Pre-Trial Brief summary for Witness DCH indicates that he would give testimony of massacres by soldiers in and around Kabuga in April 1994.[64] The Prosecution's opening statement, similarly, gave notice of the allegations of killings by soldiers at Ruhanga church.[65] Witness DBN's Pre-Trial Brief summary describes the mission to Masaka in detail.[66]

41. The Chamber finds that the Indictment and Pre-Trial Brief, taken together, reasonably informed the Defence that these material facts were relevant to paragraph 6.36 of the Indictment.

(k) Ntabakuze Ordering Killings at Kabusunzu; Para-commandos Loading Bodies at Kabusunzu; Misconduct of Soldiers at Nyakabanda and Knowledge of the Accused

42. Witness DBN testified that, during the period that the Para-commando Battalion was stationed at Kabusunzu, Ntabakuze ordered that a group of three Tutsis be taken away and killed.[67] He saw the three being led behind a building and then heard gunshots. The witness also saw Para-commando soldiers loading around fifteen dead bodies onto a truck while Ntabakuze stood ten metres away.[68]

43. Neither the Indictment nor the Pre-Trial Brief make any mention of these events, nor do they name the Kabusunzu area. The general allegation in paragraph 6.36 of the Indictment, standing alone, does not provide sufficient notice of this material fact. The

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[63] T. 22 June 2004 pp. 83-96; T. 23 June 2004 pp. 25-26; Motion, paras. 139-146.
[64] Pre-Trial Brief, p. 6603.
[65] T. 2 April 2002, p. 186 ("In the Kigali Rural préfecture soldiers and Interahamwe killed Tutsi refugees in the following places, among others: Ruhanga church ...").
[66] Pre-Trial Brief, p. 6609 ("[witness] [s]aw NSENGIYUMVA at the camp. He came to ask Ntabakuze for some soldiers to eliminate some people suspected of being Inkontanyi in Masaka forest. Few minutes later soldiers went to Masaka forest. On their return soldiers said they had found Tutsi in the banana plantation and that they were killed by soldiers.").
[67] T. 1 April 2004 p. 68 ("Q. And what did Ntabakuze say? A. He said that the dirt should be taken away and killed.")
[68] T. 1 April 2004 p. 66.

Prosecution has failed to point to any curative references to this event in the Pre-Trial Brief or opening statement. On the other hand, the Defence has failed to cite any contemporaneous objection to the admission of this evidence on the basis of lack of notice, and the Prosecution did disclose a will-say statement some months before the witness's testimony which made direct reference to his testimony. The Pre-Defence Brief summaries of no less than seven witnesses directly contradict the allegation that Para-commando soldiers engaged in any criminal conduct.[69] Under the circumstances, the Chamber finds that the Defence has not discharged its burden of showing that it did not understand the material facts alleged against him and that the preparation of Ntabakuze's defence was materially impaired.

44. The Defence also objects to the testimony of Witness AAA alleging that Para-commando soldiers were involved in indiscriminate killings and rape of civilians in Nyakabanda sector in May and June 1994. The witness further testified that he had complained about the misconduct of the soldiers to Ntabakuze, who did nothing to intervene.[70] Though there is no mention of this event in the Indictment or Pre-Trial Brief, the Chamber authorized the addition of Witness AAA to the Prosecution Witness List on 21 May 2004, accepting the Prosecution's submission that the testimony would be material to the case against Ntabakuze.[71] The Prosecution motion, followed by the Chamber's ruling, was sufficient to clearly inform the Accused that the testimony of Witness AAA would be part of the case against him. The period during which the motion was pending, and between the date of the decision and the witness's appearance, constituted a *de facto* adjournment which gave the Defence sufficient time to investigate and challenge the witness's testimony, in accordance with the rights of a fair trial. The failure of the Prosecution to amend the Indictment in accordance with this newly discovered evidence did not render its admission unfair, in the circumstances.

(l) Rwampara

45. Ntabakuze objects to the testimony of Witness DBQ describing killings by Para-commandos at St. André College and Nyamirambo in Rwampara.[72] For the reasons discussed in section (g) above in respect of alleged incidents of rape, the Chamber considers that the Defence had sufficient notice of these material facts and that they were properly admitted by the Chamber in accordance with the rights of the Accused.

(m) Kabgayi

46. The testimony of Witnesses XAI and XXY regarding events in Kabgayi is challenged for lack of notice.[73] They testified that Ntabakuze came to Kabgayi and encouraged soldiers

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[69] Witnesses DH-63, DH-66, DH-67, DH-68, DK-12, DK-39 and DK-120.
[70] T. 15 June 2004 pp. 7-8; T. 17 June 2004 p.14.
[71] *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 ("The Chamber has weighed the lateness of the application against the materiality of the evidence and the disclosure of the statements to the Defence in July 2003. Taking these factors into account, the Chamber considers that it would be in the interests of justice to add Witness AAA to the list of Prosecution witnesses."). *Bagosora et al.*, Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E), filed 24 March 2004, paras. 12-14 (after describing Witness AAA's evidence of Ntabakuze's activities in Nyakabanda *secteur*, "[t]he Prosecution submits that the expected testimony of witness AAA is material to the prosecution case …").
[72] Motion, paras. 155-158.
[73] Motion, paras. 159-165.

to collaborate with the *Interahamwe* to kill refugees in the Kabgayi hospital. The Defence objects that none of these events are pleaded in the Indictment.

47. Though the Indictment makes no mention of this event, the Pre-Trial Brief summary for Witness XAI states that the witness heard Ntabakuze telling his soldiers to use *Interahamwe* to kill Tutsi at the Kabgayi hospital.[74] In the Chamber's view, this was sufficient to put the Defence on notice of killings at the hospital.

48. Witness XXY also claimed to have heard that Ntabakuze had sent Para-commando soldiers to reinforce *Interahamwe* at Gitarama, Kibuye and Ngororero. The Prosecution has failed to identify any curative references to these events in the Pre-Trial Brief or opening statement; on the other hand, having failed to interpose a specific contemporaneous objection, the Defence bears the burden of demonstrating that it did not understand the material facts alleged, and that its preparation was materially impaired. As no such showing has been made, the evidence cannot be excluded.

49. The Chamber does not accept the Prosecution argument that the evidence would be admissible, in the absence of adequate notice, under Rule 93 as establishing a "consistent pattern of conduct". Even assuming that the evidence could be relevant under Rule 93, this would not diminish the specificity with which a material fact must be pleaded.

(n) Planning of Guerrilla Warfare, August 1994

50. The Defence seeks to exclude the testimony of Witness ZF describing a post-war gathering of officers at Lac Vert in Goma, where the Accused took part in planning guerrilla warfare in Rwanda.[75] The challenge is based not on lack of notice or sufficient precision in pleading, but on manifest irrelevance to any of the crimes charged. The Prosecution argues that the events in Goma do not constitute crimes with which the Accused is charged; rather, the evidence is relevant as post-crime conduct to establish the Accused's intent for earlier crimes.

51. The Chamber cannot categorically exclude the relevance of this event and will defer consideration of this question until closing submissions.

(o) Allegations of Weapons and Ammunition Supply

52. Ntabakuze seeks to exclude the testimony of Witnesses XAB, DP, XAP, XAQ and XAI that he was involved in the distribution of fuel and weapons to the *Interahamwe*, often at Camp Kanombe.[76] Timely objections were raised with regard to Witnesses DP[77] and XAQ,[78] though in the latter case the Defence only objected to the reference to guns, not ammunition and fuel.

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[74] Pre-Trial Brief, p. 6514 ("At Kabgayi (Gitarama), witness heard Major Ntabakuze ... telling soldiers from his escort to use the *interahmawe* to kill the Tutsi at the hospital.").

[75] T. 28 November 2002 p. 67; Motion, paras. 166-169.

[76] Addendum, paras. 8-18. The Defence also objects to the testimony of Witness DBN which indicates that Para-commandos were receiving supplies from the Transport Company of the Army Base in Camp Kanombe. Given the non-incriminating nature of the evidence, the Chamber sees no reason to exclude it.

[77] T. 2 October 2003 pp. 46-47 (referring to objection first stated at pp. 1-5).

[78] T. 23 February 2004 p. 23 ("MR. TREMBLAY: Mr. President, that is absolutely new. The statement mentions provision of ammunition and fuel, but it does not mention guns. / MR. PRESIDENT: That's true. It's noted.").

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53. At paragraph 5.22, the Indictment pleads that Ntabakuze was generally involved in weapons distribution:

> **Aloys Ntabakuze** [and others] ... distributed weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its "accomplices".

Paragraph 6.45 also refers to the provision of weapons by soldiers to militiamen. The Supporting Materials to the Indictment specify that:

> After the presidential plane was shot down, a Warrant Officer called Rudakangwa distributed weapons to the *Interahamwe* at the roadblock on the Kanombe-Kigali road via Rubirizi. They distributed generally grenades and kakashnikovs [*sic*] along with ammunition. These weapons came from the Kanombe camp and were ordered by Ntabakuze.[79]

Finally, the Pre-Trial Brief summaries of Witnesses XAQ and XAB describe distribution of supplies and ammunitions to *Interahamwe* at Camp Kanombe or by the Para-commando Battalion, and mention specifically the involvement of Ntabakuze. As such, testimony concerning distribution of weapons to Interahamwe is properly admissible.

54. The testimony of Witness DCH concerning two specific incidents of weapons distribution is also challenged. The witness testified that the Accused gave a pistol to a certain Maga at a roadblock, who then killed the owner of a Mazda car. Ntabakuze then took the Mazda. On another occasion, the Accused gave weapons to the witness, Gasana, and Mwongereza for use in an attack on Ruhanga church. The Defence objected contemporaneously to the first of these incidents, concerning Maga, but not the distribution to Gasana. The summary of Witness DCH's testimony in the Pre-Trial Brief states that he "saw Ntabakuze in a vehicule Mazda, transporting weapons which were distributed by Adjutant Gasana".

55. The Prosecution bears the burden of showing that the Defence had reasonable notice of the first event, and that its preparations were not materially impaired; the Defence bears the burden in relation to the second event. Neither party has discharged its burden. The Prosecution has failed to show that the Defence was not materially impaired. Even if such a showing had been made, an act of the Accused which constitutes part of the physical commission of a crime, as the Defence has argued here, must be pleaded in the Indictment. In the absence of such pleading, evidence of the distribution of weapons to Maga, and the Accused's alleged presence while the weapon was used to kill someone, is inadmissible.

56. The evidence of distribution of weapons to Gasana, however, did not constitute part of the physical commission of a crime by the Accused. In the absence of a contemporaneous objection, the Defence has failed to discharge its burden of showing that it was not on reasonable notice of this evidence, and that its preparations were materially impaired. The evidence is not excluded.

[79] Supporting Material to Ntabakuze and Kabiligi Indictment, 3 August 1998, p. 741.

(p) Meetings Before 6 April 1994

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57. Ntabakuze objects to the testimony of three witnesses who allege that he participated in meetings with Bagosora and others before 6 April 1994 whose purpose was to plan the extermination of the Tutsi population.[80] Witness ZF referred to a clandestine meeting in 1992 at the Butotori Camp in Gisenyi Prefecture, attended by numerous officers and civilians. Witness DCH described Ntabakuze's participation in five meetings of *Interahamwe* at the house of Bagaragaza in Kabuga between March 1993 and 4 April 1994. Witness DBQ referred to a meeting of high-ranking officers, including Ntabakuze, at Camp Kanombe in 1993.

58. Paragraph 5.1 of the Indictment states that between late 1990 and 1994, Ntabakuze conspired with his co-accused and others "to work out a plan with the intent to exterminate the Tutsi population". The Defence argues that in the absence of dates and locations of meetings, and a correct list of participants, the Defence does not have adequate notice of this material fact. The Prosecution also points to paragraph 5.10, however, which alleges that several meetings of army officers including Ntabakuze and Bagosora took place "notably at Kanombe military camp" between 1 May 1992 and 31 August 1993.

59. Paragraphs 5.1 and 5.10, taken together, gave reasonable notice of Witness DBQ's testimony.[81] The Prosecution's opening statement also put the Defence on notice of Witness ZF's testimony that "certain clandestine meetings were held in Gisenyi".[82] No specific criminal conduct of the Accused is alleged. In these circumstances, the notice provided was sufficient.

60. No reasonable notice was given, however, of the five meetings involving *Interahamwe* leaders. This evidence is of a different character than meetings between the accused and his fellow military officers and could, in itself, be incriminating. The Prosecution has been unable to point to any references in the opening statement or Pre-Trial Brief concerning this event which would clarify the very general allegations in paragraph 5.1 of the Indictment. The Defence failed to interpose any objection and, accordingly, bears the burden of showing that it was not on reasonable notice of this evidence, and that its preparations were materially impaired by that lack of notice.[83] The Defence argues that the failure to plead these material facts in the Indictment or other materials deprived it of notice, and that the facts alleged are incriminating of the Accused.[84] The Prosecution has not shown that the Defence reasonably understood the nature of the allegations, or that it was not materially impaired in its preparations.[85] For these reasons, the Chamber finds that Witness DCH's evidence of Ntabakuze's participation in meetings with *Interahamwe* leaders at Kabuga's house before April 1994 is excluded.

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[80] Addendum, paras. 19-24.
[81] Notice of Camp Kanombe meetings were given in the Pre-Trial Brief, *e.g.* the summary for Witness DQ ("Witness will state that while Camp MAYUYA (KANOMBE) was under the authority of BAGOSORA, meetings were organized by Bagosora attended by Unit Chiefs of Camp MAYUYA ... Unit Chiefs that participated regularly were ... Major NTABAKUZE, Commander of the Paratrooper Commando Battalion ...").
[82] T. 2 April 2002 p. 174.
[83] T. 23 June 2004 pp. 1-3 (Witness DCH).
[84] Addendum, paras. 19-24.
[85] Prosecution Response, para. 168.

(iii) Remedies Other than Exclusion

61. The Prosecution requests that evidence of which the Defence has had insufficient notice should be admitted as corroborative of other evidence which has been properly admitted. Alternatively, it requests permission to amend the Indictment to conform to the evidence presented.

62. The absence of notice cannot be remedied by arguing that the material fact is only indirectly relevant to the case, for example, through the doctrine of "similar fact evidence". Whether directly or indirectly relevant, the absence of notice of a material fact requires its exclusion.

63. Permitting amendment of the Indictment would, at this stage, be prejudicial to the Accused. This alternative remedy is rejected.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES the following evidence inadmissible:

1. Witness XAB's testimony of rape committed by Para-commando soldiers at Sobolirwa on or before 12 April;

2. Witness DCH's testimony that the Accused distributed weapons to Maga;

3. Witness DCH's testimony that the Accused participated in five meetings with *Interahamwe* leaders in Kabuga.

Arusha, 29 June 2006

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

[Seal of the Tribunal]