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Ivan

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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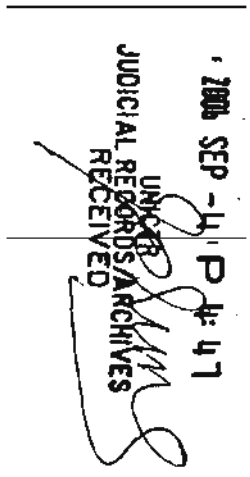
TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 4 September 2006



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON KABILIGI 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

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the Kabiligi Defence "Motion on the Prejudice Caused by the Testimony of Prosecution Witnesses on Facts not Included in the Amended Indictment", filed on 5 April 2006;

CONSIDERING the Prosecution Response, filed on 16 May 2006; and the Kabiligi Reply, filed on 29 May 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Accused Kabiligi requests that the Chamber exclude from its consideration portions of the testimony of seven Prosecution witnesses: XAI, XXH, XXQ, AAA, ZF, XXY and LAI. The material facts in the testimony were not, according to the Defence, adequately pleaded in the Indictment or otherwise communicated so as to provide proper notice in accordance with the rights of the Accused and the Rules of Procedure and Evidence.

2. The present motion is, in effect, a request for reconsideration of the Chamber's "Decision on Exclusion of Testimony Outside the Scope of the Indictment", filed on 27 September 2005 ("the Kabiligi Exclusion Decision"). That decision excluded a portion of the testimony of Witness XAI and Witness DCH, but denied all the other requests for exclusion. Kabiligi now offers additional arguments favouring exclusion, in particular, the specific prejudice which the Defence has suffered as a result of the alleged lack of notice.

DELIBERATIONS

(i) Applicable Principles

3. The legal framework for determining whether evidence is inadmissible based on alleged lack of notice of a material fact was set out at length in the Kabiligi Exclusion Decision:

> 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 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.[1]

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.[2]

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

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

4. Kabiligi asserts that the Trial Chamber erred in holding that it was permitted to consider whether the vagueness of a material fact had been cured by reference to communications other than the Indictment, such as the Pre-Trial Brief. He argues that the Appeals Chamber has reserved to itself the possibility of relying on curative communications in order to determine whether a conviction was fair. This option is not open to the Trial Chamber, which is bound to either exclude the evidence or to order that the Indictment be amended.[3]

5. A trial chamber not only has the power, but an obligation, to consider whether a vague provision in an indictment has been cured by timely, clear and consistent communications.[4] As stated by the Appeals Chamber in *Naletilić*:

> 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.[5]

In appropriate circumstances, Trial Chambers have exercised their discretion in favour of curing.[6] Decisions to do so have been expressly upheld by the Appeals Chamber.[7]

6. Failure to plead the physical perpetration of a criminal act by an accused under a count of the Indictment constitutes a defect.[8] On the other hand, "less detail may be

[3] Motion, paras. 15-17.
[4] *Ntagerura et al.*, Judgement (AC), para. 65 (holding that the Trial Chamber had committed an error of law in failing to consider whether defects in the Indictment had been cured).
[5] *Naletilić*, Judgement (AC), para. 26.
[6] *Kajelijeli*, Judgement (TC), para. 408 (Trial Chamber II); *Gacumbitsi*, Judgement (TC), para. 191 (Trial Chamber III); *Kamuhanda*, Judgement (TC), paras. 59-60 (Trial Chamber II); *Bizimungu et al.*, Decision on Ndindiliyimana's Extremely Urgent Motion to Prohibit the Prosecution From Leading Evidence on Important Material Facts Not Pleaded in the Indictment Through Witness ANF (TC), 15 June 2006, para. 32 (Trial Chamber II).
[7] *Ntakirutimana*, Judgement (AC), paras. 94 ("In light of the principles discussed above, the Trial Chamber's conclusion was correct. Although the allegation of an attack at Gitwe Hill could and should have been specifically pleaded in the Indictment, the Defence was subsequently informed in a clear, consistent, and timely manner that it had to defend against this allegation"), 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"), 108 ("The details in Annex B and the statement of Witness CC notified the Defence that the Prosecution would allege that Elizaphan Ntakirutimana transported attackers and pointed out Tutsi refugees near the Gishyita-Gisovu road. The Trial Chamber therefore committed no error in concluding that the Bisesero Indictment's failure to allege these facts was cured"), 119 ("The Appeals Chamber therefore finds that the failure in the Bisesero Indictment to allege with specificity that Elizaphan Ntakirutimana was in a convoy which included attackers was cured by subsequent information communicated to the Defence); *Niyitegeka*, Judgement (AC), paras. 225 ("it was clear from the Prosecution's Pre-Trial Brief that the Prosecution intended to charge the Appellant with participation in an attack on that date and at that location, and that testimony would be adduced stating that the Appellant was armed and shot at Tutsi refugees ... Accordingly, the Prosecution gave the Appellant clear, consistent and timely information"), 228 ("Accordingly, the Appeals Chamber finds that the Trial Chamber did not err in finding that the Appellant had sufficient notice of the material facts"), 237 ("the failure [to plead the material fact in the Indictment] was cured by information in the Pre-Trial Brief. The Trial Chamber therefore committed no error in relying on this evidence and, consequently, this ground of appeal is dismissed").

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'".[9] 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.[10]

7. Whether a defective indictment has been cured depends on "whether the accused was in a reasonable position to understand the charges against him or her".[11] 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.[12] In *Naletilić*, 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.[13]

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.

8. The Appeals Chamber has also recognized that "defects in an indictment … may arise at a later stage of the proceedings because the evidence turns out differently than expected".

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

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

[10] *Gacumbitsi*, Judgement (AC), para. 49 ("The Appeals Chamber has held that 'criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible "the identity of the victim, the time and place of the events and the means by which the acts were committed"'. An indictment lacking this precision may, however, be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge").

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

[12] *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").

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

Where this is the case, the Chamber must "consider whether a fair trial required an amendment of the indictment, an adjournment, or the exclusion of the evidence outside the scope of the indictment".[14] In accordance with this reasoning, the Chamber will also entertain the possibility that the filing of a motion for the addition of a witness provides adequate notice, provided that the motion is granted and there was a sufficient delay between the filing of the motion and the appearance of the witness.[15]

9. 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.
> ...
> [A]n 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.[16]

The present motion is, in substance, an attempt by the Kabiligi Defence to discharge this burden.

(ii) Grounds Raised for Reviewing Previous Decision

(a) General Prejudice Suffered Due to Death of Potential Witnesses

10. Almost every material fact which the Chamber did not exclude in the Kabiligi Exclusion Decision is to be found in the Prosecution Pre-Trial Brief, filed on 21 January 2002. This was four months before opening statements in the trial; almost eight months before the first witness; and more than seventeen months before any witness was heard other than the expert Alison Des Forges and Witness ZF.[17] Under these circumstances, to the extent that a material fact was disclosed in the Pre-Trial Brief, the Chamber reaffirms its previous finding that the Defence was in a reasonable position to understand the charges and material facts against him.

11. The Defence claims, however, that it has suffered general prejudice because a number of potential Defence witnesses died during the interval between the filing of the Indictment in

[14] *Naletilić*, Judgement (AC), para. 25.
[15] *See Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006, paras. 10, 44.
[16] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 199-200.
[17] Opening arguments were made on 2 April 2002. Proceedings were then adjourned until 2 September 2002, when Prosecution expert witness Alison Des Forges took the stand. The first factual witness, Witness ZF, started his testimony on 26 November 2002. The second factual witness was not heard until 16 June 2003, when the Trial Chamber was re-constituted after the non-re-election of one judge, and the retirement of another.

August 1999 and "the first mention of some of the additional facts and allegation in the Prosecution case in 2003 and 2004".[18]

12. The prejudice of which the Defence complains is not related to vagueness in the Indictment. Any prejudice, if it can be so characterized, arises from the fact that the witnesses in question died before the beginning of the Kabiligi Defence. The interval between the filing of the allegedly vague Indictment in August 1999 and the filing of the curative Pre-Trial Brief in January 2002 has had no effect on delaying the beginning of the Defence. Nor is it clear how the taking of statements during that period would have assisted the Defence, as such statements would not, barring exceptional circumstances, have been admissible at trial as evidence. Accordingly, the alleged lack of notice has had no impact on the Defence's ability to call witnesses, and does not justify reconsideration of the Chamber's previous findings.

(b) Witness ZF

13. Kabiligi objects to testimony of Witness ZF naming the Accused as a member of a communications network called the "zero network", arguing that this evidence is nowhere to be found in the Pre-Trial Brief or the witness's statement. The first time the Defence had knowledge of this allegation is said to be during the witness's testimony.[19]

14. No contemporaneous objection was made to this testimony, in which the Accused was named as a member of the zero-network along with many other military and political figures.[20] Witness ZF used a number of different names to describe communication network, and to relate it to other organizations:

> 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.[21]

15. The Indictment makes no mention of these groups by name, but paragraphs 1.13 – 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".[22] Although the Accused is not expressly identified as a member of any group preparing such a strategy, the fact that the Accused is the indictee would reasonably suggest that he had some connection to an organization named in his indictment.

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[18] Motion, para. 29.
[19] Motion, paras. 35-37.
[20] T. 27 November 2002 pp. 36-37, 61-66
[21] T. 27 November 2002 pp. 67-68.
[22] Indictment, para. 1.15.

16. On this basis, and in light of the rather general character of the evidence, the Chamber finds that the Accused was reasonably informed that this material fact was part of the case against him.

(c) Witness XXH

17. The Kabiligi Defence objects to evidence that the accused personally shot and killed an unidentified military deserter at a roadblock in May 1994.[23] During XXH's testimony, the Defence raised a timely objection to the evidence on the basis that it fell outside the scope of the Indictment.[24] In the Kabiligi Exclusion Decision, the Chamber held:

> 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. As proof that the Accused committed a crime by killing the specified individual, the evidence is highly incriminating. On the other hand, the Prosecution argued that this evidence was relevant only to "the ability and willingness of this particular Accused to effect disciplinary measures upon soldiers". 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.

The Defence argues that this fact is not to be found in the Indictment, Pre-Trial Brief, or in any written statement of the witness. In its present submissions, the Defence emphasizes that this is the only evidence that the Accused personally killed anyone and is, for that reason, particularly prejudicial. The Prosecution responds that adequate notice of this event was provided by Witness XXH's Pre-Trial Brief summary, which says that "military deserters were killed on Kabiligi's orders in front of Kabiligi".[25] A will-say statement was disclosed the day before the witness's testimony to the effect that the accused "shot" soldiers.[26] The purpose of the evidence is to show the Accused's "ability and willingness ... to effect disciplinary measures upon soldiers".[27] The Prosecution also argues that "the fact that [the Accused] selectively punished soldiers is highly relevant".[28]

18. Although the Prosecution does not intend to use the testimony as direct evidence that the Accused physically committed a crime charged in the Indictment, the evidence is nevertheless highly prejudicial. If true, it would demonstrate brutality and zeal in punishing his soldiers, not merely that he had the means to do so. More broadly, the incident could be used to invite the inference that the Accused was undisciplined and erratic in discharging his duties as a senior officer. Even if not used as evidence of direct commission of a crime, the effect of the evidence is sufficiently incriminating and serious that the Defence ought to have had a reasonable opportunity to investigate and refute the evidence. Disclosure of a will-say the day before the testimony did not afford such an opportunity. Under these circumstances, the evidence is inadmissible.

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[23] T. 4 May 2004 pp. 57-58.
[24] T. 4 May 2004 pp. 58-59.
[25] Prosecution Response, para. 87.
[26] *Id.*, para. 88.
[27] T. 4 May 2004 p. 59 ("... the relevance of this particular testimony goes to the ability and willingness of this particular Accused to effect disciplinary measures upon soldiers, and that is relevant to the issue of whether any soldiers under his command were disciplined in 1994 for the killing or the raping or any of the other crimes that took place; in other words, it's a failure-to-punish issue, a willingness to punish for certain things, a failure to punish for other things."); Prosecution Response, para. 91.
[28] Prosecution Response, para. 91.

(d) Witness XXQ

19. The Defence argues that Witness XXQ was improperly added to the Prosecution witness list without leave of the Chamber and that his testimony should be excluded on that basis in its entirety.[29] The Chamber rejects this argument. Any remedy for improperly adding a witness to the witness list should have been requested before the witness's appearance. Exclusion at this stage of the proceedings on the basis of adequacy of notice, is not an appropriate remedy for the procedural impropriety alleged by the Defence.

20. In the Kabiligi Exclusion Decision, the Chamber held:

> 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". 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."
>
> 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 mentioned in the Pre-Trial Brief. 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. The prejudicial impact of the witness's use of the term "genocide" is ambiguous. On the basis of the information before the Chamber on this motion, the Chamber cannot be satisfied that no notice of this material fact has been given.[30]

21. The Accused had general notice that the witness would testify that he was somehow aware of a plot to recommence the war against the RPF, and that he announced the existence of this plan at a meeting in February 1994. The added elements that a specific date had been set, and that a genocide was planned, are ancillary to the more general allegation that the Accused was somehow aware of these plans. Accordingly, sufficient notice was given of the general allegation to place the Defence in a reasonable position to understand the material facts. Although the use of the term "genocide" is more prejudicial than the references in the Pre-Trial Brief and the witness's prior statement to "resuming the war", the Chamber finds that these are details which are best evaluated on the merits.

(e) Other Witnesses

22. No other grounds have been raised to suggest that the Chamber erred in law or failed to appreciate the relevant facts in the Kabiligi Exclusion Decision. Accordingly, there is no basis to reconsider any other legal or factual finding made therein.

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[29] Motion, para. 41.
[30] Kabiligi Exclusion Decision, paras. 13-14.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES inadmissible Witness XXH's testimony that the Accused shot dead a suspected deserter.

Arusha, 4 September 2006

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge