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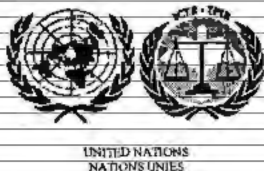

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 15 September 2006

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THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON NSENGIYUMVA MOTION FOR EXCLUSION OF EVIDENCE OUTSIDE THE SCOPE OF THE INDICTMENT

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 Nsengiyumva Defence "Motion for the Exclusion of Evidence of Allegations Falling Outside the Indictment Pursuant to Articles 17 and 18 of the Statute of the International Tribunal and Rules 47, 50, 53 *bis* and 62 of the Rules of Procedure and Evidence", filed on 9 May 2006; and the "Corrigendum", filed on 16 May 2006;

CONSIDERING the Prosecution Response, filed on 19 May 2006; and the Nsengiyumva Reply, filed on 7 June 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Nsengiyumva Defence requests that the Chamber exclude from its consideration twenty categories of Prosecution evidence on the basis that they fall outside the scope of the Indictment.[1] The Defence argues that these matters are not mentioned in the Indictment with sufficient specificity to be admissible against the Accused. The Defence accepts that vagueness in an indictment may be cured through subsequent communications from the Prosecution, but asserts that such occasions are exceptional and did not take place here.[2]

2. The Prosecution submits that the evidence in question is relevant to the Indictment. To the extent that paragraphs in the Indictment are vague in relation to the evidence, the Prosecution relies on other communications such as the Particulars of the Indictment, the Supporting Materials, and the Pre-Trial Brief to show that any such defects were cured. Additional details were provided through disclosure of witness statements and at least one motion for leave to vary the Prosecution witness list. Furthermore, the Defence should not now be able to request exclusion of evidence where it failed to register a contemporaneous objection. The Prosecution also argues that the Defence has suffered no prejudice from the alleged vagueness of the Indictment, having made submissions and presented evidence which responds directly and precisely to the Prosecution evidence which it now seeks to exclude.[3]

DELIBERATIONS

(i) Applicable Principles

3. The legal framework for determining whether evidence is inadmissible based on alleged lack of notice of a material fact has been discussed on four previous occasions by the Chamber in response to Defence motions similar to that now under consideration.[4] The first of these decisions laid the foundation for analyzing such a motion:

[1] Motion, para. 49.
[2] Reply, paras. 3-15.
[3] Prosecution Response, paras. 16-20.
[4] *Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment (TC), 27 September 2005 ("Kabiligi Exclusion Decision I"); *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006 ("Ntabakuze Exclusion Decision"); *Bagosora et al.*, Decision on Kabiligi Motion

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

for Exclusion of Evidence (TC), 4 September 2006 ("Kabiligi Exclusion Decision II"); *Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Testimony of Witness XAI (TC), 14 September 2006.

> 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.[5]

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.[6]

4. 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.[7] 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.[8]

In appropriate circumstances, Trial Chambers have exercised their discretion in favour of curing.[9] Decisions to do so have been expressly upheld by the Appeals Chamber.[10]

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[5] Kabiligi Exclusion Decision I, paras. 2-3.

[6] *Naletilić*, Judgement (AC), para. 26 ("a Trial Chamber can only convict the accused of crimes which are charged in the indictment"); Kabiligi Exclusion Decision II, para. 3; *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"); Kabiligi Exclusion Decision II, para. 3.

[7] *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); Kabiligi Exclusion Decision, para. 5.

[8] *Naletilić*, Judgement (AC), para. 26; Kabiligi Exclusion Decision II, para. 4.

[9] *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).

[10] *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 aud 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

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5. Failure to plead the physical perpetration of a criminal act by an accused under a count of the Indictment constitutes a defect.[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.[13]

6. 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".[14] 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.[15] 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

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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"); Kabiligi Exclusion Decision II, para. 5.

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

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

[13] *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"); Kabiligi Exclusion Decision II, para. 3.

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

[15] *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").

> notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[16]

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.[17]

7. 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". 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".[18] 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.[19]

8. 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.[20]

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.[21]

9. 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

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[16] *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.

[17] Kabiligi Exclusion Decision II, para. 7.

[18] *Naletilić*, Judgement (AC), para. 25.

[19] Ntabakuze Exclusion Decision, paras. 10, 44; Kabiligi Exclusion Decision II, para. 8.

[20] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 199-200; Kabiligi Exclusion Decision II, para. 9.

[21] Ntabakuze Exclusion Decision, paras. 7, 9.

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. Notice of a material fact anywhere in the Pre-Trial Brief would inform the Defence of the need to address and investigate the allegation, regardless of the specific witness who is said to be the source of the information.[22] The Pre-Trial Brief is a means of giving additional particulars concerning the Prosecution case, not only the content of individual witness's testimony. 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 or drew attention to the material facts on which the witness would testify; second, where a lengthy adjournment was ordered by the Chamber for the express purpose of allowing the Defence to meet newly discovered material facts.[23]

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

(a) The Butare, Rubavu and Mudende Incidents (Witnesses XBH, XBG and XBM)

10. The Defence objects to testimony from Witness XBH that: (i) the Accused attended a meeting in Butare with Colonel Bagosora and Captain Nizeyimana where they drew up a list of people to be killed; (ii) Tutsis on that list were targeted on a priority basis during killings in the commune of Nyamyumba, Butare *préfecture*; and (iii) the Accused handed over Tutsis to *Interahamwe* in Rubavu commune in or near Gisenyi Town who led them away to be killed.[24]

11. Witness XBH was the object of three written motions before and after his testimony: a Prosecution motion requesting leave to add his name to the witness list under Rule 73 *bis* (E); a Defence motion requesting that his proposed testimony concerning the drawing up of lists be excluded in advance; and finally, a Defence motion requesting that Witness XBH be recalled for further cross-examination on the basis of a statement given by the witness after his testimony, upon which the Defence wished to question the witness.[25] The combined effect of the Chamber's decisions on the first two motions was to allow the Prosecution to call Witness XBH, and to authorize questions, in particular, concerning the drawing up of lists in Butare. The Chamber found that no prejudice would arise from such questioning in light of

[22] Although the Pre-Trial Brief is 168 pages long, it does not constitute the type of disclosure which could lead to material facts being buried amongst a great mass of detail.

[23] Paras. 8 and 9 of the present decision substantially correspond to paras. 7 and 10 of the *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006. An interlocutory appeal on these points is now pending before the Appeals Chamber. *Bagosora et al.*, Decision on Request for Certification of Decision on Exclusion of Evidence (TC), 14 July 2006. The Chamber has considered the parties' submissions concerning the Prosecution's alleged non-compliance with a previous decision in this trial requiring the Prosecution to provide further particulars to the Indictment. Motion, paras. 11-20; Response, paras. 6-8; Reply, paras. 16-21. The Chamber does not consider it necessary to resolve this issue; the requests for exclusion will be examined in light of the principles enunciated in this section.

[24] Motion, paras. 50-53.

[25] Confidential Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence, filed on 13 June 2003; Defence Notice of Intended Objection to Elements of Testimony of Witness XBH, filed on 30 June 2003; Nsengiyumva's Extremely Urgent Motion to Recall Prosecution Witness XBH for Further Cross-Examination, etc., filed on 6 April 2005.

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the period of notice of the witness's testimony, and that the addition of the witness was in the interests of justice under Rule 73 *bis* (E). Furthermore, the Chamber specifically held that the testimony concerning the drawing up of lists was relevant to paragraphs 5.1, 5.25 and 5.29 of the Indictment.[26] The Chamber is of the view that disclosure of a witness statement in conjunction with a motion for leave to allow that witness to appear before the Chamber, places the Defence on notice that the matters mentioned in the statement may be elicited during the witness's testimony.[27] Disclosure of a witness statement under these circumstances is entirely different from a massive disclosure of witness statements without any guidance as to the relevance of those statements to the trial.

12. The Chamber considers that notice of all three material facts objected to by the Defence was sufficient. Even if notice was for some reason inadequate at the time of the witness's first appearance, the witness was recalled for further questioning more than two years later.[28] If the Defence believed that it had suffered any prejudice due to lack of notice at the time of his first appearance, the occasion of his recall offered an opportunity to cross-examine the witness in light of subsequent investigations on these matters. Indeed, an adjournment is precisely one of the remedies foreseen by the Appeals Chamber to ensure that "the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case".[29] The Defence having had an ample opportunity to investigate and confront the material facts offered by Witness XBH, the evidence is admissible.

13. The Defence also objects to the testimony of Witnesses XBG and XBM concerning the Accused's involvement in massacres at Mudende University.[30] Witness XBG testified that Nsengiyumva sent soldiers and *gendarmes* to the University to encourage the killing of Tutsis.[31] Witness XBM stated that Nsengiyumva arrived at the University in a military jeep, gave orders for Hutus to clear the campus and left before the subsequent massacre of Tutsi students.[32]

14. The Prosecution motion for leave to add Witnesses XBG and XBM to the witness list makes specific reference to their expected testimony concerning the Accused's role in massacres at Mudende University. This provided clear and unequivocal notice that the Prosecution intended to rely on these material facts as proof of the allegations in paragraphs 6.11 and 6.22 of the Indictment concerning the Accused's involvement in killing civilian Tutsis, and that he gave orders to militias to carry out such killings. On this basis, the Chamber finds this evidence to be admissible.

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[26] *Bagosora et al.*, Decision on Defence Objection to Elements of Testimony of Witness XBH (TC), 3 July 2003, paras. 6-11; *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witness Pursuant to Rule 73 *bis* (E).

[27] Ntabakuze Exclusion Decision, paras. 10, 44.

[28] T. 18 May 2005 p. 7 (oral ruling authorizing recall of Witness XBH). The witness testified on 3, 4 and 7 July 2003 and on 20, 21 and 22 July 2005.

[29] Kabiligi Exclusion Decision, para. 2; *Ntakirutimona*, Judgement (AC), 13 December 2004, para. 26 ("such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment").

[30] Motion, paras. 54-55.

[31] T. 8 July 2003 p. 37.

[32] T. 14 July 2003 pp. 43-47.

(b) Busasamana Killings

15. The Defence objects to testimony of Witness XBG that the Accused was personally involved in a massacre at Busasamana Parish which allegedly took place shortly after the massacre at Mudende University in May 1994.[33] The witness testified that the Accused arrived at Busasamana, addressed a group of approximately 2,000 *Interahamwe* and then stayed on the scene giving orders as the *Interahamwe* attacked the chapel.[34]

16. The Prosecution's opening statement substantially conveys the content of this testimony:

> In Gisenyi, you will hear evidence of an efficiently executed scorched earth programme of killing Tutsis, personally supervised by Lieutenant-Colonel Nsengiyumva ... You will hear evidence of killings done at the Catholic diocesan parish of Nyundo ... You will hear similar stories of killings done by *Interahamwe* and soldiers in the parish of Busasamana.[35]

The statement of Witness XBG, which was communicated to the Defence in conjunction with the Prosecution motion discussed above for amendment of its witness list, placed the Defence on notice of more precise details as to the nature of this material fact. These communications gave the Defence sufficiently specific notice of the material facts which are relevant to the general allegations in paragraphs 6.11 and 6.22 of the Indictment concerning the Accused's involvement in killing civilian Tutsis, and his orders to militias to engage in such killings. On this basis, the evidence is admissible.

(c) Bisesero Killings

17. The Defence seeks to exclude the testimony of Witnesses Omar Serushago and ABQ concerning allegations that the Accused sent *Interahamwe* to Bisesero Hills in Kibuye to attack Tutsi refugees.[36]

18. Paragraph 6.27 of the Indictment alleges that Nsengiyumva was ordered by Edouard Karemera to send troops to the Bisesero area in Kibuye. The Indictment was accompanied by a document entitled "Supporting Material", which consists of specific and focused excerpts from statements of prospective witnesses in relation to each paragraph of the Indictment. This document provided the Defence with a clear indication of the material facts which the Prosecution would present at trial. It reproduces the letter from Karemera in its entirety as well as a summary of anticipated testimony for Witness FF, which describes the killing of Tutsi civilians in Bisesero Hills.[37] In addition, Omar Serushago's summary of anticipated testimony in the Pre-Trial Brief indicates that he would testify to Nsengiyumva's involvement in a meeting to discuss an intervention in Kibuye.[38]

[33] Motion, paras. 56-57.
[34] T. 8 July 2003 pp. 70-80.
[35] T. 2 April 2002 pp. 188-89.
[36] Motion, paras. 58-60.
[37] Supporting Material to Nsengiyumva Indictment (hereinafter "Supporting Material"), filed on 3 August 1998, p. 112.
[38] Pre-Trial Brief, filed on 21 January 2002, Appendix A, p. 157.

19. The Defence argues that paragraph 6.27 of the Indictment and the proposed testimony of Omar Serushago refer to "troops", not *Interahamwe*.[39] However, paragraph 4.5 of the Indictment does allege generally that the Accused had "authority over the MRND militia, the *Interahamwe*, and the CDR militia, the *Impuzamugambi*" by virtue of his rank, previous positions, and personal relations. The Chamber does not accept, in light of the totality of the Indictment, that the Defence would have been prejudiced in its investigations or that it would have misapprehended the nature of the material facts alleged against the Accused. The Supporting Material and Pre-Trial Brief provide additional detail on the involvement of *Interahamwe* in these events. On this basis, the evidence is admissible.

(d) Killings at Roadblocks in Kiyovu

20. The Defence objects to testimony by Witness DAS that Nsengiyumva appeared at roadblocks in the Kiyovu neighbourhood of Kigali while killings were being carried out by soldiers and *Interahamwe*.[40] The testimony contains no allegation that Nsengiyumva actually participated in the killings or gave orders to kill, but Witness DAS gave no indication that the Accused took exception to the behaviour he was witnessing.[41]

21. The Chamber rejects the Prosecution assertion that a reading of the Indictment as a whole provided notice to the Accused of these allegations. The amended version of paragraph 6.22 of the Indictment alleges that the Accused "ordered militiamen, in a continuous and ongoing fashion, to eliminate Tutsis at roadblocks and to track them down and exterminate them".[42] The Pre-Trial Brief furnished further detail, stating that Witness DAS would testify to killings at roadblocks in Kiyovu and his observations of the Accused during these killings. The Chamber finds that the Indictment is sufficiently specific in respect of these allegations; even if this were not the case, the Pre-Trial Brief would have cured any vagueness in the Indictment.[43] Accordingly, the evidence is admissible.

(e) Meetings to Plan and Preparation of Lists

22. The Defence seeks to exclude the testimony of Witnesses XBH, ABQ, DO, XXQ and HV regarding the production and use of lists of people to be killed.[44] Witness XBH testified that the Accused had actual involvement in the creation of such lists and that he distributed copies of the lists to several named individuals.[45] Witness ABQ recounted a meeting at which Nsengiyumva read Tutsi names from a list and ordered that these individuals be killed.[46] Witness DO gave testimony about individuals who were killed pursuant to a list given by the Accused.[47] Witness XXQ talked about the Accused's involvement in a group known as AMASASU and a list drafted by the group defining the enemy.[48] Finally, Witness HV

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[39] Reply, para. 53.
[40] Motion, para. 61.
[41] T. 5 November 2003 pp. 19-20.
[42] As amended by Particulars, filed 25 May 2000.
[43] Pre-Trial Brief, Appendix A, p. 37 ("The witness was guard at Terre Des Hommes in Kiyovu, the center of Kigali. He observed significant evidence of killings by PG and Interahamwe, particularly around roadblocks. Observed BAGOSORA and NSENGIYUMVA in area. At a major roadblock, witness hears Bagosora giving orders and heard him say not to spare any Tutsi").
[44] Motion, paras. 62-67.
[45] T. 3 July 2003 pp. 16-18; 25-26.
[46] T. 6 September 2004 pp. 6-7.
[47] T. 30 June 2003 p. 42.
[48] T. 11 October 2004 pp. 28-32, 38-39, 46-49.

described masked soldiers reading names from a list and asking those persons named to come forward.[49]

23. Paragraph 5.1 of the Indictment alleges that, between 1990 and 1994, the Accused conspired with Bagosora and others to plan the extermination of Tutsis, a plan which included "the preparation of lists of people to be eliminated". Nsengiyumva is alleged under paragraph 5.26 to have had responsibility for supervising the establishment of these lists and for updating them. Paragraph 5.29 alleges that military and *Interahamwe* carried out massacres of Tutsis and moderate Hutus on the basis of these pre-established lists.

24. Further precision in respect of the direct involvement of the Accused was provided by subsequent communications to the Defence. For the reasons discussed in section (a) above, the Chamber finds that the Accused had sufficient notice of Witness XBH's allegations, not only concerning the drawing up of a list, but also its use in the killing of Tutsis in Gisenyi.[50] It would have been evident from this information and references in the Pre-Trial Brief that the Accused was involved in the distribution of these lists, not only their preparation. Witness DO's testimony is also admissible on that basis.[51] The testimony of Witness ABQ is also admissible. Indeed, the Prosecution submits that the meeting described by Witness ABQ is alleged at paragraph 6.16 of the Indictment.[52] The Supporting Material provided additional details, through a statement attributed to Witness OQ:

> The next day, April 7, 1994 I saw Colonel Anatole Nsengiyumva come to the house of one man who was our neighbour called Barnabe Samvura ... Colonel Anatole Nsengiyumva had a list of names of people who had to be killed immediately in Gisenyi. I saw him hold the list and he read and distributed the list to some nf the CDR Party leaders. I heard Colonel Nsengiyumva instruct CDR people to start killing people. He said "start the work" [*sic*] Colonel Anatole Nsengiyumva parked his military car in front of Barnabe's home near my family house. I heard him say "start the work here." That "here" was ... house. I saw him pointing at ... house. Colonel Nsengiyumva gave orders for the killings to start ... house. After Colonel Anatole Nsengiyumva gave the orders, CDR members and some other Interahamwe who joined the meeting later, started blowing whistles. As the crowd got bigger, I managed to escape. That day, CDR members killed .... Together, six ... were killed in the presence of Colonel Anatole Nsengiyumva. I was hiding in a house near by and saw him standing there near our house.[53]

The specificity provided in both the Indictment and Supporting Material was further reinforced in the Prosecutor's motion to add Witness ABQ to its witness list.[54] On this basis,

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[49] T. 23 September 2004 pp. 29-32.

[50] *See also* Decision on Defence Objection to Elements of Testimony of Witness XBH (TC), 3 July 2003, para. 11.

[51] To the extent that notice of "distribution" as distinct from the creation of such lists would have been helpful to the Defence, this element was communicated, for example, through the Pre-Trial Brief, Summary of Witness OQ: "Witness saw a list of names of people who had to be killed being distributed by Colonel Nsengiyumva to members of the CDR political party and the *Interahamwe*."

[52] Prosecutor's Response, para. 159.

[53] Supporting Material, pp. 98-99.

[54] Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E),filed on 24 March 2004, para. 17 (stating that Witness ABQ would testify that he "saw a list in NSENGIYUMVA'S hand and heard him read out more than 10 names of Tutsi to be killed" and that he had "first-hand information about the attacks that were subsequently carried out pursuant to NSENGIYUMVA'S order"). The Chamber granted the Prosecutor's

the Chamber finds that sufficient notice was given of the material facts concerning the involvement of the Accused in the preparation and distribution of lists, as described by these witnesses. The evidence is admissible.

25. In respect of evidence specifically concerning AMASASU, although the Indictment does not mention the group by name, paragraphs 1.13 to 1.16 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". According to paragraph 1.15, their strategy included "the preparation of lists of people to be eliminated" and "the assassination of certain political opponents". In addition, the Supporting Material quotes an expert witness 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".[55] Consequently, and given the rather general character of Witness XXQ's evidence, the Chamber finds the testimony to be admissible.

(f) Masaka Killings

26. The Defence seeks to exclude the testimony of Witness DBN, who stated that the Accused travelled to Camp Kanombe, obtained soldiers from Ntabakuze and then oversaw killings at Masaka.[56]

27. Paragraphs 6.33 and 6.36 of the Indictment plead that the Accused, by virtue of his position, exercised authority over members of the *Forces Armées Rwandaises* (FAR), their officers and militiamen, and that these subordinates committed massacres with Nsengiyumva's knowledge. The Pre-Trial Brief provides more detail through a summary of Witness DBN's anticipated testimony:

> Saw 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.[57]

28. The Indictment and the Pre-Trial Brief, taken together, reasonably informed the Defence of this allegation, and the evidence is admissible.

(g) Killings of Tutsi Women at Gisenyi Roadblock

29. The Defence states in its motion that "the allegations by Witness DCH concerning the alleged killings of Tutsi women at a roadblock in Gisenyi are not pleaded in the Indictment."[58]

30. The Defence pleading is deficient. The testimony in question – at least at the reference provided by the Defence – makes no allegation that the Accused was personally

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request to add Witness ABQ, finding it to be in the "interests of justice". Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, para. 19.

[55] Supporting Material, pp. 13-14 (excerpt from report of André Guichaoua).

[56] Motion, para. 68.

[57] Pre-Trial Brief, Appendix A, p. 45.

[58] Motion, para. 69.

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involved in the event described.[59] Under these circumstances, the Chamber considers that paragraph 6.21 of the Indictment provides adequate notice of this material fact. Even if the evidence were to more directly implicate the Accused, the Chamber notes that the Indictment alleges in paragraphs 6.21 and 6.22 that roadblocks were set up in Gisenyi *préfecture* between April and July 1994 and that killings took place there under the supervision of the Accused. Particulars in support of paragraph 6.22 further allege that the Accused "ordered militiamen, in a continuous and ongoing fashion, to eliminate Tutsis at roadblocks…."

(h) Documents Linked to Planning

31. The Nsengiyumva Defence objects to the testimony of Prosecution expert Alison Des Forges concerning to sets of documents referred to as the "MELVERN Documents" and the "FARZZZ Documents". The Defence argues that "her particulars are not mentioned in the indictment or in the expert report" and that her testimony was "outside her field of expertise and in respect of which she lacks first-hand knowledge".[60]

32. The Chamber considers that the arguments raised in the motion concern the probative value of the expert's testimony, rather than exclusion. No proper basis for exclusion having been articulated, the request is rejected.

(i) Death Squads and Networks

33. The Defence seeks the exclusion of the testimony of Witnesses Filip Reyntjens, ZF, XXQ and XBM concerning the Accused's alleged involvement in death squads and networks such as the AMASASU.[61]

34. Although the Indictment makes no reference to death squads and networks by name, paragraphs 1.13 to 1.16 do mention "prominent civilian and military figures", who shared an "extremist Hutu ideology" and who worked together from as early as 1990 to pursue a "strategy of ethnic division and incitement to violence", which included the use of lists to target and kill political opponents. Further detail was provided in the Supporting Material: one expert witness discussed the group AMASASU, of which the Accused is alleged to have been a member,[62] and Witness OA claimed that "[e]veryone knows that Anatole NSENGIYUMVA was one of the leaders of the death squad …"[63] On the basis of the Indictment and the Supporting Material, the Chamber finds that the Accused was reasonably informed that these general allegations were part of the case against him and admits the testimony of Witnesses Reyntjens, ZF, XXQ and XBM in this regard.

(j) Sending *Interahamwe* to Kigali by Bus

35. The Defence objects to the testimony of Witness DCH, who saw Nsengiyumva at a stadium in Gisenyi as *Interahamwe* were loaded onto buses bound for Kigali.[64]

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[59] The transcript reference provided by the Defence is T. 24 June 2004, p. 70.
[60] Motion, paras. 70-72. The parties mistakenly reference "Melvlin Documents" instead of "Melvern".
[61] Motion, paras. 73-77; Reply, para. 71.
[62] Supporting Material, pp. 13-14 (excerpt from report of André Guichaoua).
[63] Supporting Material, p. 101.
[64] Motion, paras. 78-80.

36. The Indictment pleads generally that Nsengiyumva was involved in the training and supervision of militia groups in Gisenyi, including the *Interahamwe*.[65] In support of paragraph 5.16 of the Indictment, the Supporting Material discloses the following information, based on a statement of Witness ON:

> Anatole NSENGIYUMVA was also the co-ordinator of the *Interahamwe* in the prefecture. He allegedly supervised the distribution of weapons to administrative authorities and civilians well before the genocide. Moreover, his work as co-ordinator also consisted of recruiting militiamen. At a certain point, the young recruits whom everyone knew, went to receive paramilitary training in weapon handling. They were taken to the Gishwati forest and to Mutura commune. My Hutu colleague were among those who received the training ... On several occasions, I saw Anatole NSENGIYUMVA accompany bus convoys of *Interahamwe* going to their training grounds.[66]

37. The Pre-Trial Brief contains numerous references to the Accused's involvement in the training and deployment of *Interahamwe*.[67] Taken together, the Indictment, Supporting Material and Pre-Trial Brief provided the Accused with adequate notice that such allegations would form part of the case against him and need not be pleaded with greater specificity. Moreover, the presence of the Accused at the stadium is not, in itself, highly incriminating. Consequently, the evidence is admissible.

(k) Meetings to Plan the Killings of Tutsis and Meeting of Survivors

38. The Defence requests exclusion of three categories of evidence related to this general topic: (i) Witness ABQ's testimony concerning a meeting at Samvura's house, chaired by the Accused, on 7 April at which the participants received orders to attack Tutsis which led immediately thereafter to an attack on the home of a certain Mbungo; (ii) testimony of Witness XBG, OAF and OAB concerning the role of the Accused at meetings in Gisenyi where people were encourage to kill Tutsis; and (iii) testimony of Witness ABQ concerning a meeting of Tutsi survivors at Umuganda Stadium in Gisenyi, attended by Nsengiyumva, whose purpose was to expose the survivors to further attacks.[68]

39. The Indictment alleges at paragraphs 5.1 that the Accused and Samvura conspired to exterminate Tutsis and "organized, ordered and participated in the massacres". Paragraph 6.16, which the Prosecution asserts is the same meeting discussed by Witness ABQ, further pleads:

> At one of those meetings, Anatole Nsengiyumva gave the order to start the massacres, designating a specific location where a Tutsi family had sought refuge. In the minutes that followed that order, the militiamen executed the members of the family in Anatole Nsengiyumva's presence.

[65] Indictment paras. 5.15, 5.16, 5.21 and 6.36. For paragraph 5.16 of the Indictment, additional information was provided by means of particulars to the effect that the Accused's involvement in the training consisted of "providing military instructors" and that trainings took place between 1 June 1993 and 31 July 1994 at Gishwati, Bigogwe, in Mutara Commune and at the Umuganda Stadium. Particulars, para. 5.16.
[66] Supporting Material, p. 59.
[67] Pre-Trial Brief, Appendix A, pp. 34, 153-60 (summaries of anticipated testimony for Witnesses DAJ and ZD).
[68] Motion, paras. 81-87 ; T. 6 September 2004 pp. 8-9, 14-19.

The excerpts in the Supporting Material in relation to paragraph 6.16 state that the meeting was held on 7 April at Samvura's house, and that the Accused instructed "CDR people to start killing people".[69] Furthermore, the motion to add Witness ABQ to the Prosecution witness list, which was subsequently granted by the Chamber, offered a detailed account of the witness's expected testimony concerning the conduct of the Accused at a meeting at Samvura's house on 7 April, including his role in the subsequent attack.[70] The Indictment itself provided sufficiently specific notice of this allegation. To the extent that there is any lack of specificity, the additional materials provided clear, consistent and timely notice of the testimony, and its relevance to the Indictment.

40. Paragraph 6.16 states that the Accused "chaired meetings at which he ordered the militiamen to kill the Tutsi." Paragraph 6.22 states that "[b]etween 8 April and mid-July 1994, Anatole Nsengiyumva ordered militiamen and soldiers to exterminate the civilian Tutsi population and its 'accomplices'". Paragraph 6.14 makes specific reference to the distribution of weapons. The Supporting Material offers further details concerning specific meetings at which the Accused is alleged to have been present and his conduct. The summaries of testimony of Witnesses OAB and XAS in the Pre-Trial Brief give more details about specific meetings. The motion for the addition of Witness ABQ offers a detailed summary of the testimony expected from the witness, and the charges in the Indictment to which it is relevant.[71] That motion, which was subsequently granted by the Chamber, indicates that Witness ABQ would be called to give testimony about a meeting at Samvura's house on the morning of 7 April, at which the Accused is alleged to have exhorted the participants to kill Tutsis more quickly. The motion for the addition of Witness XBG indicates that the witness's expected testimony concerns "distribution of weapons to the militia, the *Interahamwe* and *Impuzamugambi*".[72] The Indictment itself provided sufficiently specific notice of this allegation. To the extent that there is any lack of specificity, the additional materials provided clear, consistent and timely notice of the testimony, and its relevance to the Indictment.

41. The same cannot be said, however, concerning Witness ABQ's evidence concerning a meeting at Umuganda Stadium in May 1994 to which Tutsi civilians were lured with promises of security. According to Witness ABQ, Nsengiyumva spoke to the refugees. Shortly after his departure, a group of Interahamwe arrived and took the Tutsis away to their deaths.[73] A specific contemporaneous objection was raised by the Defence, and was noted by the Chamber.[74]

42. The Chamber is of the view that this evidence is inadmissible. Although the Indictment does make general allegations about the Accused's role in killings of civilians, there is no allegation resembling this meeting or this particular type of conduct. Furthermore, the Prosecution failed to point to any timely, clear and consistent communications which would cure the vagueness of the Indictment in relation to this evidence. The Prosecution's reference to evidence of Defence witnesses does not, in the circumstances, provide an

[69] Supporting Material, pp. 98-99.
[70] Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the rules of Procedure and Evidence, filed on 24 March 2004, para. 17.
[71] Prosecutor's Motion For Leave to Vary the Witness List, etc., filed on 24 March 2004, para. 7.
[72] Motion for Leave to Vary the Witness List, etc., filed on 13 June 2003, para. 7.
[73] T. 6 September 2004 pp. 13-16.
[74] Id. pp. 14-15.

adequate indication that the Defence had sufficient notice of this material fact.[75] This evidence is excluded.

(l) Meetings at Gisenyi Scouts Camp and Butotori Site

43. The Defence objects to testimony of Witness DCH that the Accused participated in three meetings in Gisenyi: two meetings in 1992 or 1993 involving the Accused and other high-ranking army officers and politicians at Butotori and then, the next day, at the Hotel Meridien; and a meeting in June 1994 at the Gisenyi Scouts Camp during which Minister Rafiki Hyacinthe issued orders to kill Tutsis.[76] Aside from alleging Nsengiyumva's presence at these meetings, Witness DCH did not attribute any orders or behaviour to him. On the other hand, the presence of the Accused at these meetings might imply agreement with some of the views expressed during those meetings.

44. The paragraphs of the Indictment cited by the Prosecution are only vaguely relevant to the evidence in question. Further, the Prosecution has been unable to point to any reference in the Supporting Material to the Indictment, the Pre-Trial Brief, or the opening statement which gives notice of these events with any greater specificity. The Prosecution relies on references to this evidence in a statement of Witness DCH and a statement of Witness ZF, both of which appear to have been routinely disclosed by the Prosecution in accordance with their obligations under the Rules. The only connection between these statements and the Pre-Trial Brief is that the "Pre-Trial Brief Revision" indicates that Witness DCH and other witnesses will testify concerning paragraph 6.33 of the Indictment, which refers to a conspiracy amongst political and military authorities to exterminate the Tutsi population. The summary of Witness DCH's testimony, annexed to the Pre-Trial Brief, contains no reference to these meetings.

45. The Chamber concludes that the vagueness of the Indictment in relation to these meetings has not been cured by timely, clear and consistent notice of the material fact to which Witness DCH testified.

(m) Killings at Mutura Commune

46. The Defence seeks to exclude the testimony of Witnesses XBM and XBG concerning killings that occurred across Mutura Commune.[77]

47. For the reasons expressed in section (a) above, this request is denied.

(n) Killing of Bagogwe Tutsis

48. The Defence objects to the testimony of Witnesses DCH and HV about killings of Bagogwe Tutsis.[78] Witness DCH asserted that the Accused was present when bodies of Bagogwe Tutsis were displayed in a vehicle outside the Gisenyi *préfecture* office.[79] This

[75] Response, para. 179.
[76] Motion, paras. 88-89, T. 22 June 2004 pp. 59-63.
[77] Motion, paras. 90-93.
[78] Motion, paras. 94-95.
[79] T. 23 June 2004 pp. 41-43. According to the witness, the bodies were displayed to "serve as a lesson" to Hutus of the value of Tutsi lives.

incident took place sometime between 1992 and 1993.[80] Witness HV testified that, on 8 April 1994, a crowd of people descended onto the campus of Mudende University with machetes, sharpened bamboo and clubs and killed the Bagogwe Tutsis who had taken refuge there.[81]

49. Though the Indictment mentions the Bagogwe Tutsis as a group targeted by civilian and military authorities, it makes no specific reference to the particular incident described by Witness DCH.[82] The Pre-Trial Brief, however, provides additional details in the form of the summaries of the testimony of Witness OAB and OD, both of which mention the killings of Bigogwe Tutsi prior to 1994 as part of the Prosecution case.[83] Specifically, the summary of Witness OAB states that the witness "saw bodies of Tutsi massacred in Bigogwe and transported in a pickup escorted by BIZIMANA's soldiers".[84] Consequently, the Chamber finds that the Accused had notice of this allegation and admits the evidence. As previously discussed, the fact that the summary of Witness DCH does not also contain this allegation does not diminish the notice given by virtue of the Pre-Trial Brief. Such notice of a material fact anywhere in the Pre-Trial Brief would inform the Defence of the need to address and investigate the allegation, regardless of the specific witness from whom the Prosecution elicits the evidence in support thereof.

50. The testimony of Witness HV is also admissible.[85] Although no mention of massacres at Mudende University can be found in the Indictment, the summary for Witness HV contained in the Pre-Trial Brief provided the following information:

> Witness will state that following the announcement of the President's death, smoke engulfed the entire campus and the witness saw villagers running to take refugee [*sic*] at campus. On 8th April 1994 the witness saw soldiers armed with guns and wearing red caps and multicoloured but predominantly green clothes together with villagers armed with machetes, sticks, clubs and sharp bamboo, storm into classes where Tutsi had taken refuge and massacred all of them.[86]

To the extent that allegations in the Indictment concerning the Accused's alleged role in the killing of Tutsi civilians are vague, the Pre-Trial Brief provided timely, clear and consistent information that the Prosecution intended to rely on this material fact.

(o) Installation of the Radio RTLM Antenna and Incitement Messages

51. The Defence seeks to exclude the testimony of Witnesses XBM and DBN concerning the installation of an RTLM antenna and its subsequent broadcasts.[87] Witness XBM testified that the Accused urged people "to separate the wheat from the chaff" at the inauguration of

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[80] T. 23 June 2004 pp. 38, 43.
[81] T. 23 September 2004 pp. 25-26.
[82] Indictment, para. 5.30. The killing of Bagogwe Tutsis referred to in the Indictment is alleged to have occurred in 1991 as a precursor to the events of 1994.
[83] Pre-Trial Brief, Appendix A, pp. 105, 109.
[84] Pre-Trial Brief, Appendix A, p. 105.
[85] The Chamber notes that this allegation is distinct from the one previously discussed (see section (a) above) concerning massacres at Mudende University in May 1994, as described by Witnesses XBG and XBM.
[86] Pre-Trial Brief, Appendix A, p. 87.
[87] Motion, paras. 96-97.

the new RTLM antenna.[88] Witness DBN then described messages broadcast on RTLM, which were aimed at inciting the population to violence against the Tutsi population.[89]

52. The Indictment alleges that incitement of the population to hatred of the Tutsi was a fundamental part of the plan of genocide.[90] As part of the plan, prominent figures from the President's circle set up RTLM to ensure widespread dissemination of calls to violence.[91] The Prosecution further elaborated upon this allegation in its opening statement:

> Your honours, they gave support and assistance to the hate radio, RTLM, in its propaganda of fear and hatred of Tutsis and Hutus opposed to the MRND party. They also gave support and assistance to the hate radio RTLM in its incitement of attacks against these civilian targets.[92]

53. The Pre-Trial Brief further suggested that RTLM would be an important issue in the case. It alleged that Nsengiyumva was a shareholder in RTLM and that RTLM was a "central instrument in the genocide as it happened and before".[93] Summaries of anticipated testimony of Witnesses DBN and Kambanda in the Pre-Trial Brief as well as potential exhibits all make reference to RTLM.[94] Furthermore, the Prosecution motion for the addition of Witness XBM to the witness list indicates that he would testimony concerning anti-Tutsi statements by the Accused "during public meetings and rallies held in Gisenyi".[95] Although there is no explicit reference to the inauguration of the RTLM antenna, the Defence would at least have been placed on notice that it should look closely at the statement of the proposed statement to understand the material facts to which the proposed witness would testify. Page 5 of Witness Statement XBM-1 provides a detailed description of the Accused's conduction on that occasion, and there can be no doubt that, in responding to the Prosecution motion and its subsequent preparations, that the Defence would have understood that this evidence was part of the Prosecution case, and its relevance to the Indictment.

54. In the Chamber's view, the Indictment is itself sufficiently specific concerning the significance of RTLM broadcasts for the evidence to be admissible on that basis alone. To the extent that there may any vagueness concerning the Accused's speech at the inauguration of the RTLM antenna, adequate notice was provided by other communications as to justify its admission.

(p) Orders to Kill Former Director of School Printing House

55. The Defence challenges the testimony of Witness OAB that the Accused issued orders in June 1994 to have the former director of the school printing house executed.[96]

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[88] T. 14 July 2003 pp. 31-32 (responding to what those words meant, the witness stated "I do not quite know what he meant, but I think that the Hutus had to hunt down or chase the Tutsis").
[89] T. 1 April 2004 pp. 60-61.
[90] Indictment, paras. 5.4, 5.5, 5.8.
[91] Indictment, para. 1.16.
[92] T. 2 April 2002 p. 154.
[93] Pre-Trial Brief, pp. 3-4. It further alleged that RTLM was part of a conspiracy by ringleaders of the genocide.
[94] *See, e.g.*, Pre-Trial Brief, Appendix A, p. 45, Appendix A1, Registry no. 6480, Appendix B, Registry no. 6459.
[95] Motion for Leave to Vary the Witness List, etc., filed on 13 June 2003, para. 9.
[96] Motion, para. 98.

56. The Indictment makes general allegations that the Accused issued orders to militiamen and soldiers to exterminate Tutsis in paragraphs 6.16, 6.22, and 6.23.[97] Paragraph 6.28 alleges that in June 1994, Nsengiyumva participated in a meeting in Gisenyi at which "Joseph Nzirorera and Juvénal Uwilingiyimana took note of the names of the Tutsi and moderate Hutu who had come from other prefectures. They drew up a list of people to eliminate, which they handed over to the *Interahamwe*." Amongst the Supporting Material underlying this paragraph is a statement from Omar Serushago, which states in particular that during the meeting "we were given a list of people to be killed including Stanis Simbizi, the manager of the school print shop in Kigali". The Chamber does not consider the Indictment to be defective in relation to the evidence and, even if it were, the notice provided by the Supporting Materials would have provided timely, clear and consistent notice of the material fact so as to cure any deficiency.

(q) Training of Militia

57. The Defence seeks to exclude the testimony of Witnesses XBM and ABQ concerning the Accused's personal involvement in the training of militia.[98] Witness XBM stated that the Accused provided the programme for trainings and spoke as part of these trainings.[99] Witness ABQ also heard the Accused speak as part of a training program.[100]

58. Paragraphs 5.14 to 5.16 of the Indictment describe Nsengiyumva's close involvement in and supervision of the training of militia groups.[101] The Supporting Material provided further detail regarding Nsengiyumva's training activities in Gisenyi:

> Anatole NSENGIYUMVA was also the co-ordinator of the *Interahamwe* in the prefecture. He allegedly supervised the distribution of weapons to administrative authorities and civilians well before the genocide. Moreover, his work as co-ordinator also consisted of recruiting militiamen. At a certain point, the young recruits whom everyone knew, went to receive paramilitary training in weapon handling. ... On several occasions, I saw Anatole NSENGIYUMVA accompany bus convoys of *Interahamwe* going to their training grounds. Most of the militiamen were dressed in civilian clothes and wore hats with CDR insignia.[102]

59. The Indictment and Supporting Material gave the Accused sufficient notice that his direct involvement in the training of militia groups would form part of the case against him. Consequently, the evidence is admissible.

(r) Distribution of Weapons

60. The Defence asks the Chamber to exclude the testimony of five witnesses relating to Nsengiyumva's alleged involvement in the distribution of weapons at various times and

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[97] The Prosecution provided particulars in support of paragraph 6.22 of the Indictment, but the additional information does not reference this specific allegation. Particulars, para. 6.22.
[98] Motion, paras. 99-101.
[99] T. 14 July 2003 pp. 36-37.
[100] T. 6 September 2004 pp. 29-31.
[101] Indictment, para. 5.16 ("In Gisenyi prefecture, between June 1993 and July 1994, Anatole Nsengiyumva supervised the training of the MRND militia, the *Interahamwe*, and that of the CDR militia, the *Impuzamugambi*"). As discussed previously, additional information for paragraph 5.16 of the Indictment was provided by means of particulars. Particulars, para. 5.16.
[102] Supporting Material, p. 59 (summary of anticipated testimony of Witness ON).

locations.[103] Witness XBM testified that Nsengiyumva, along with Jean-Bosco Barayagwiza, took firearms from his vehicle and distributed them to approximately 50 people.[104] Witness Omar Serushago testified that the Accused was in command of a camp in Gisenyi where he handed out weapons to *Interahamwe*.[105] Witness XXQ indicated that the AMASASU group, of which the Accused was allegedly a member, was involved in the distribution of weapons as part of the planning for the genocide.[106] Witness ZF described weapons brought from the Seychelles and distributed to militia at Gisenyi stadium.[107] Witness OAF testified that Nsengiyumva was present while boxes of grenades were unloaded and distributed by civilians and soldiers.[108]

61. The Indictment refers repeatedly to the Accused's direct participation in the distribution of weapons, including several specific occasions when he allegedly gave weapons to *Interahamwe* and militiamen.[109] The Supporting Material provided additional detail on these allegations, as based on statements given by Witnesses ON, EB, DO, OX, OY and ZF.[110] Numerous witness summaries in the Pre-Trial Brief also mentioned the Accused's alleged involvement in the distribution of weapons, including many eyewitness observations of the Accused.[111] These allegations are sufficiently detailed to give notice to the Accused of the testimony of Witnesses Serushago, XXQ and ZF.

62. Sufficient notice of the testimony of Witness OAF, where distribution of weapons is alleged in the presence of Nsengiyumva, was provided by the Supporting Material to paragraph 6.16 of the Indictment:

> [O]n the same April 7, 1994, Colonel Anatole Nsengiyumva called a meeting at the taxi park in Gisenyi ... There were so many Interahamwe at this meeting. There were boxes and [*sic*] boxes of grenades and guns at this meeting place. I saw them. Later, I saw Captain Bizimuremyi open boxes of guns and grenades with Colonel Nsengiyumva, Bernard Munyagishari, Omari and the rest of the people present. I saw Bernard Munyagishari, Omari Thomas, Colonel Nsengiyumva etc hand over so many guns and grenades to the Interahamwe at this meeting. Captain Bizimuyemyi and Colonel Nsengiyumva supervised the distribution of these arms in general may be because they were military officers and

[103] Motion, paras. 102-107.
[104] T. 14 July 2003 pp. 32-33.
[105] T. 18 June 2003 pp. 25, 44.
[106] T. 11 October 2004 p. 31.
[107] T. 28 November 2002 p. 62.
[108] T. 23 June 2003 pp. 10-11.
[109] Indictment, paras. 5.14, 5.19-5.24, 6.14, 6.16, and 6.21. Further detail was provided by the Prosecution in the form of particulars, which allege that the Accused distributed weapons on a continuous basis between certain dates at certain specific locations. Particulars, para. 5.23.
[110] Supporting Material, pp. 59, 62-63, 97, 99, and 104. Witness ON would purportedly say that the Accused "supervised the distribution of weapons" before the events of 1994. Witnesses EB, DO, OX, and OY described events where the Accused allegedly unloaded weapons for later distribution, gave orders for distribution of weapons, and distributed weapons himself.
[111] Pre-Trial Brief, Appendix A, pp. 105-106, 108, 110-111, 114-115, 117-118, 124, 144, 146, 150, 154-155. The summaries of witnesses OAB, OAE, OB, OF, PA, XXA, XXF and Serushago describe the distribution of weapons, while those of Witnesses OJ, OO, OQ, OY, PC, PW, XAS and Ruggiu describe personal observations of the Accused engaged in the distribution of weapons.

knew all about arms. After thes[e] arms and grenades were distributed, the Interahamwe went out and started killing Tutsis and moderate Hutus.[112]

63. Notice was also provided for the testimony of Witness XBM through the Prosecution's motion to add the witness, which stated that the witness had first-hand information about Bagosora and Nsengiyumva distributing weapons to the militia.[113] All of the evidence in this category is admissible as relevant to the Indictment.

(s) Rape Allegations

64. The Defence objects to the testimony of Witness ZF that several members of the *Interahamwe*, including Omar Serushago, had a house where they brought young Tutsi girls to rape and then kill.[114]

65. The Indictment makes allegations of sexual assaults and other crimes in several places.[115] Specifically, paragraph 6.24 states:

> Between April and July 1994, Bernard Munyagishari, his group of militiamen and Omar Serushago's group of militiamen abducted, confined, raped, sexually assaulted and committed other crimes of sexual nature against Tutsi woman [*sic*] and girls.

66. The Supporting Material elaborated on this paragraph with the anticipated testimony of Witness ZF:

> As regards sex crimes, I can tell you that it was common knowledge that several militiamen would rape Tutsi girls and then kill them .... I also remember that Damas, one of the militiamen I mentioned earlier, has [*sic*] a house in Gisenyi where he took and kept girls for a while before executing them.... He said ... that the house was used by himself, Omar and Thomas ... for keeping people, some of them young, and rape them before executing them ....[116]

67. Additional detail was also provided in the Pre-Trial Brief through the anticipated testimony of Witnesses EB, OAM, OAO, and Omar Serushago.[117] Through the Indictment, Supporting Material and Pre-Trial Brief, the Accused had sufficient notice that this allegation would form part of the case against him, and the evidence is admissible.

(t) Killings of Other Persons

68. The Defence requests the exclusion of testimony by Witnesses OAB, OAF, and ZF, each of whom gave testimony that the Accused gave orders on a specific occasion for

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[112] Supporting Material, p. 99.

[113] Confidential Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) of the Rules of Procedure and Evidence, filed on 13 June 2003, para. 9.

[114] Motion, para. 108.

[115] Indictment, paras. 5.32, 6.24 and 6.34.

[116] Supporting Material, p. 107. Testimony was expected for two other witnesses concerning the alleged rapes. Supporting Material, pp. 107-09 (summary of anticipated testimony by Witnesses ZD and EB).

[117] Pre-Trial Brief, Appendix A, pp. 68, 107-08, 157.

precisely identified individuals to be killed.[118] The three individuals concerned are Saad; Thomas, and Tegeli.

69. Where the Accused is alleged to have given precise orders for the killing of specific individuals, the obligation to provide precisions as to the circumstances thereof is at its highest. The Prosecution has failed to provide any references to sufficiently detailed paragraphs of the Indictment, or to communications outside of the Indictment, which would have given the Defence notice of the specific occasions in question. Accordingly, the Chamber excludes the evidence.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part.

DECLARES the following evidence pieces of evidence inadmissible:

1. Witness ABQ's testimony that the Accused participated in a meeting of survivors at Umuganda Stadium in May 1994 and that the survivors were later killed by *Interahamwe*;

2. Witness DCH's testimony about two meetings in Gisenyi in 1992 or 1993 of top political and military leaders, the first held at Butotori and the second held at the Hotel Meridien;

3. Witness DCH's testimony concerning a meeting in June 1994 at the Gisenyi Scouts Camp during which Minister Rafiki Hyacinthe issued orders to kill Tutsis;

4. Witness XBM's testimony about meetings in Gisenyi *préfecture*, with the exception of a meeting at Méridien Hotel in May 1994 which is admissible; and

5. The testimonies of Witnesses OAB, OAF, and ZF that the Accused issued orders for the killing of Saad, Thomas, and Tegeli, respectively.

Arusha, 15 September 2006

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

[Seal of the Tribunal]

[118] Motion, paras. 109-111. The Defence withdrew its request for exclusion of portions of Witness XBH's testimony: Corrigendum, para. 3.