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TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 19 October 2006

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON DEFENCE ORAL MOTIONS FOR EXCLUSION OF WITNESS XBM'S TESTIMONY, FOR SANCTIONS AGAINST THE PROSECUTION AND FOR EXCLUSION OF EVIDENCE OUTSIDE THE SCOPE OF THE INDICTMENT

Articles 17(4) and 20 of the Statute, Rule 47(C) of the Rules of Procedure and Evidence

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INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005. Prosecution Witnesses ZF and XBM were called to testify during the third trial session which started on 15 May 2006.

2. Throughout their testimony, the Defence for Nzirorera raised objections on the admissibility of some parts of their evidence and requested the exclusion of certain parts of the witnesses' evidence. The Defence for Karemera and Ngirumpatse also expressed concerns about the way in which the Prosecution evidence had been led in the light of the allegations set forth in the Indictment, and they supported Nzirorera's objections. The Prosecutor opposed the Defence objections and submitted that adequate notice of the disputed evidence was given in the Indictment, Pre-Trial Brief, including the summary of the witnesses' evidence, and in the witnesses' statements. Considering that these objections raised similar and significant factual and legal issues relating to the charges against the Accused persons, the Chamber considered it more appropriate to address them together in a written decision.

3. In addition to these specific objections, at the end of the trial session the Defence requested the exclusion of Witness XBM's testimony in its entirety and for sanctions against the Prosecution as a result of the late disclosure of a statement taken from the witness in 2005.

DISCUSSION

4. The present section will firstly discuss the request to exclude Witness XBM's testimony in its entirety, and then address the other objections raised by the Defence.

1. Defence Request for Exclusion of Witness XBM's Testimony and Sanctions against the Prosecution

5. On 5 July 2006, while Witness XBM was still testifying in the current proceedings, the Prosecution disclosed to the Defence a statement taken from the witness by ICTR investigators stationed in Kigali on 6 September 2005. The Defence for Nzirorera, joined by the Defence for Karemera and Ngirumpatse,[1] claimed that such a late disclosure was a clear violation of the Prosecution's obligation to disclose copies of the statements of all witnesses it intends to call to testify at trial no later than 60 days before the date set for trial, as prescribed under Rule 66(A) of the Rules of Procedure and Evidence. It therefore requested the exclusion of XBM's testimony in its entirety and for sanctions to be imposed against the Prosecution

[1] T. 5 July 2006, pp. 5-7.

under Rule 46(A) of the Rules.[2] Prosecution Counsel acknowledged the late disclosure but explained that he had only become aware of the existence of the document when the witness had mentioned it for the first time in court the day before. He said that the failure to disclose was a mistake.[3]

6. Exclusion of evidence is at the extreme end of a scale of measures available to the Chamber in addressing delay in disclosure and violation of the rights of the Accused.[4]

7. In the present case, the Defence has not shown that it has suffered any prejudice from the late disclosure of the witness' statement which would justify such an extreme remedy. The Defence had an opportunity to cross-examine the witness on this specific statement and its alleged inconsistencies with his evidence given in court.[5] Consequently, even if the Defence suffered prejudice from the late disclosure, the Chamber is of the view that the appropriate remedy was granted. It must also be noted that witness' statements had already been disclosed to the Defence in a timely manner, such that the Defence had been given information on his anticipated evidence and issues affecting his credibility.[6] Under these specific circumstances, the Chamber is satisfied that the fair trial of the Accused was not compromised by the late disclosure of the witness' statement. The Defence's application seeking the exclusion of Witness XBM's testimony in its entirety therefore falls to be rejected.

8. The Chamber is of the view that no sanction under Rule 46 of the Rules is warranted against the Prosecution. Contrary to the Defence's assertion, the situation at hand is distinguishable from when the Chamber issued a warning against the Prosecution due to its failure to disclose material related to Witness T.[7] At that time, while the Defence was requesting full disclosure of material concerning Prosecution Witness T and complaining about breach in the Prosecution's disclosure obligations, the Prosecution repeatedly claimed that it had complied with its obligations. However, it later acknowledged that, upon further investigation, it realised that the disclosure was not actually complete. The Chamber found

[2] T. 5 July 2006, pp. 2-4. Rule 46: "A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for Prosecution."
[3] T. 5 July 2006, p. 9.
[4] *Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Case No. ICTR-98-44-T, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8.
[5] T. 5 July 2006, pp. 1-2.
[6] See: Statement dated of 26 and 27 February 2003; Record of Confession and Guilty Plea dated 20 January 2003.
[7] T. 24 May 2006, pp. 35-36.

that such behaviour showed a lack of diligence in the Prosecution's compliance with its obligations, which obstructed the proceedings and was contrary to the interests of justice.[8] However, in the present situation, as soon as the Prosecution became aware of the document concerning Witness XBM, it endeavoured to find it and then disclosed it forthwith to the Defence. It acknowledged that this failure was due to a mistake and stated that it was ready to be sanctioned if the Chamber found it appropriate.[9] The Prosecution is presumed to have discharged its obligations in good faith.[10] In the light of these circumstances, and in the absence of any showing to the contrary, the Chamber has no reason to believe that the Prosecution acted in bad faith or lacked due diligence in discharging its duties in this instance.

2. Defence Objections to the Admission of Some Parts Witnesses ZF and XBM's Testimonies

9. The Chamber deems it necessary to recall the applicable principles of law with respect to the issues at stake; it will then apply these principles to the specific objections raised by the Defence in the present case.

2.1. Applicable Law

10. The oral objections raised by the Defence raised two kinds of legal issues on the applicable law: first, concerning the charges against an accused; second, concerning the admissibility of evidence.

(i) Applicable Law Concerning the Charges against an Accused

11. Article 17(4) of the Tribunal's Statute and Rule 47(C) of the Rules of Procedure and Evidence require the Prosecution to set forth in the indictment a concise statement of the facts of the case and of the crime(s) with which the suspect is charged. This obligation must be interpreted in light of the rights of the accused to a fair trial, to be informed of the charges against him, and to have adequate time and facilities for the preparation of his defence.[11] According to the jurisprudence of both *ad hoc* Tribunals, this imposes an obligation upon the Prosecution to state the material facts underpinning the charges in the indictment, but not the

[8] T. 24 May 2006, pp. 35-36.
[9] T. 5 July 2006, p. 9.
[10] *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), para. 183.
[11] Statute, Articles 19, 20(2), 20(4)(a) and 20(4)(b).

evidence by which such material facts are to be proven:[12] the indictment has to fulfil the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence.[13]

12. Whether particular facts are "material" depends upon the nature of the Prosecution case. The Prosecution's characterisation of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice.[14] Where the Prosecution alleges that an accused personally committed the criminal acts in question, it must, so far as possible, plead the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision."[15] 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."[16] Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[17] If the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise.[18]

13. Failure to set forth the specific material facts of a crime constitutes a defect in the indictment. On occasion, material facts are not pleaded with the requisite degree of specificity in an indictment because the necessary information was not in the Prosecution's possession.[19] In this context, it must be emphasised that the Prosecution is expected to know its case before proceeding to trial and may not rely on the weakness of its own investigations in order to

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[12] *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, paras. 25 and 470; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, paras. 301-303; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 21; *Prosecutor v. Mladen Naletilic and Vinko Martinovic*, Case No. IT-98-34-A, Judgement (ICTY AC), 3 May 2006, para. 26.
[13] *Ntakirutimana* Appeal Judgement, paras. 25 and 470; *Ntagerura* Appeal Judgement, para. 22.
[14] *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Judgement (AC), 28 February 2005, para. 28.
[15] *Naletilic* Appeal Judgement, para. 24.
[16] *Ibidem.*
[17] *Ibidem.*
[18] *Ntagerura* Appeal Judgement, para. 24; *Kvocka* Appeal Judgement, para. 28.
[19] *Naletilic* Appeal Judgement, para. 25.

mould the case against the accused as the trial progresses.[20] A defect in the indictment may also arise because the evidence turns out differently than expected. In these circumstances, the Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[21]

14. In addition, according to the established jurisprudence of this Tribunal, a defect in the indictment may be cured where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness.[22] As the Appeals Chamber stated, ""curing" is likely to occur only in a limited number of cases."[23] Only material facts which can be reasonably related to existing charges and do not lead to a "radical transformation" of the Prosecution's case may be communicated in such a manner.[24] In making this determination, Chambers have looked at information provided through the Prosecutor's Pre-Trial Brief or its opening statement. As the Appeals Chamber emphasises, these are not the sole methods by which an indictment can be cured.[25] Depending on the circumstances, the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and charges in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment, may serve to put the accused on notice. The Appeals Chamber also held that "the mere service of witness statements or of potential exhibits by the Prosecution pursuant to the disclosure requirements does not suffice to inform an accused of material facts that the Prosecution intends to prove at trial."[26] 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

[20] *Naletilic* Appeal Judgement, para. 25.
[21] *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 18.
[22] *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 195; *Ntagerura* Appeal Judgement, paras. 30; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 49; *Naletilic* Appeal Judgement, para. 25.
[23] *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 21.
[24] *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, paras. 29 and 30: Omission of a count or charge from the indictment cannot be "cured" by the provision of timely, clear, consistent information.
[25] *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 35.
[26] *Ntakirutimana* Appeal Judgement, para. 27; *Niyitegeka*, Judgement (AC), para. 197; *Naletilic* Appeal Judgement, para. 25.

the Accused that the allegation is part of the Prosecution case.[27] The Appeals Chamber, nevertheless, held that a witness statement, when taken together with the unambiguous information contained in the Pre-Trial Brief and its annexes, may be sufficient to cure a defect in an indictment.[28]

15. When deciding whether a defective indictment has been cured, the essential question is therefore whether, depending on the specific circumstances of each case, the accused was in a reasonable position to understand the charges against him or her and to confront the Prosecution's case.[29] In addition, where a Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudices an accused's right to a fair trial by hindering the preparation of a proper defence.[30]

(ii) Admissibility of Evidence

16. The Rules of Procedure and Evidence govern the proceedings.[31] The Chamber is not bound by national rules of evidence and may, in cases not otherwise provided for in the Rules, apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.[32]

17. Rule 89 (C) of the Rules provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". The Appeals Chamber has constantly ruled that this Rule provides a Chamber with broad discretion to admit relevant hearsay evidence. The fact that the evidence is hearsay does not neeessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than given to the testimony of a witness who has testified under oath and who has been

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[27] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 3; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 3.

[28] *Ntakirutimana* Appeal Judgement, para. 48; *Gacumbitsi* Appeal Judgement, para. 57.

[29] *Rutaganda* Appeal Judgement, para. 303; see also: *Ntakirutimana* Appeal Judgement, paras. 27 and 469-472; *Ntagerura* Appeal Judgement, paras. 30 and 67; *Gacumbitsi* Appeal Judgement, para. 49.

[30] *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, para. 26

[31] Rules of Procedure and Evidence, Rule 89.

[32] Rules of Procedure and Evidence, Rules 89(A) and (B).

cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence.[33]

18. As a general rule, the admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence, an issue to be decided by the Trial Chamber after hearing the totality of the evidence.[34]

19. To be admissible, the "evidence must be in some way relevant to an element of a crime with which the Accused is charged."[35] According to Appeals Chamber, when it has been found that a material fact has not been sufficiently pleaded in the indictment, this alone does not render the evidence inadmissible.[36] The evidence can be admitted to the extent that it may be relevant to the proof of any allegation sufficiently pleaded in the indictment.[37]

20. When deciding on the admissibility of evidence, the Chamber must also guarantee the protection of the rights of the Accused as prescribed by Articles 19 and 20 of the Statute. The Chamber therefore has inherent power to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.[38]

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[33] *Prosecutor v. Naser Oric*, Case No. IT-03-68-T, Order concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings (TC), 21 October 2004; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 January 1999, para. 15.

[34] *Prosecution v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admission of Prosecution Exhibits 27 and 28 (TC), 31 January 2005, para. 12; see this Chamber prior oral decisions, T. 22 September 2005, p. 2 and T. 27 February 2006, pp. 7-9.

[35] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 3; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 3.

[36] *Prosecution v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15; *Prosecution v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration (AC), 27 September 2004, para. 12.

[37] *Ibidem*. See also: *Prosecutor v. Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006, footonote 40.

[38] See this Chamber prior oral decision, T. 27 February 2006, pp. 7-9. See International Criminal Tribunal for Former Yugoslavia, Rules of Procedure and Evidence, Rule 89(D).

2.2. Application to the Defence Oral Objections in the Present Case

21. Under the following sections, the Chamber will address each of the Defence objections in relation to the testimonies of Witnesses ZF and XBM in the light of the above-mentioned principles.

(i) On the Objections raised by the Defence Relating to Witnesses ZF's Testimony

22. The Defence for Joseph Nzirorera argued that some aspects of Witness ZF's testimony are material facts not pleaded in the Indictment. It also contended that in some instances, his evidence was not reliable, had no probative value and that its admission would be prejudicial to Joseph Nzirorera. It therefore requests the Chamber to exclude the portions of Witness ZF's testimony pertaining to:

a. Those who were members of the *réseau zéro* network;[39]
b. Meetings held by Ngirumpatse in Gisenyi from 1992 to late 1993 and meetings of military and civilian authorities at a certain location throughout 1990-1994;[40]
c. Nzirorera's presence at a distribution of weapons after 6 April 1994.[41]

a. Evidence on Members of *Réseau Zéro* Network

23. Witness ZF testified to the existence of a secret telecom network called *réseau zéro* which was used by members of President Habyarimana's inner circle.[42] The witness described those people using different names depending on the considered periods; sometimes they were called "the *Abakozi*, the workers" and sometimes "the dragons." He explained that there was a relationship between the *réseau zéro* and the *Akazu*, the presidential circle which included people who came from the same part of the country as the President, especially Ruhengeri and Gisenyi. Since the President needed additional support, the *Akazu* group progressively included people whom he considered to be trustworthy from other regions in the country. This extended group was then called "the dragons."[43]

24. The Defence for Nzirorera objected to the admission of the evidence on the *réseau zéro* and its members. It argued that this material fact was not pleaded in the Indictment, and

[39] T. 16 May 2006, p. 18.
[40] T. 16 May 2006, p. 24; T. 16 May 2006, p. 55. The name of the location is kept under seal.
[41] T. 16 May 2006, p. 76.
[42] T. 16 May 2006, p. 16.
[43] T. 16 May 2006, p. 17.

its source was not reliable enough or had no sufficient probative value for it to be admitted.[44] The Prosecutor replied that the evidence adduced regarding *réseau zéro* would be used to prove the charge of conspiracy to commit genocide and since being part of a communication network is not criminal, *per se*, it need not to be pleaded in the Indictment. Regardless, the Prosecutor contended that sufficient notice of these facts was given to the Accused through the witness' 1998 statement and "a number of disclosures."[45]

25. The identity of participants to a conspiracy to commit genocide and the participation of the Accused with others in a specific group conspiring to commit genocide are material facts which have to be pleaded in the Indictment. The Chamber notes that there is no reference to the *réseau zéro* and its membership in the Indictment. The Pre-Trial Brief only contains a footnote where it is said that "[s]ociologist André Guichaoua and historian Alison Des Forges, as well as several factual witnesses, will comment that Joseph Nzirorera, whether actually by deed or only by reputation, was associated with the [...] "Reseau Zero" that planned and executed political assassinations as a method of social control."[46] Nowhere in Witness ZF's summary of his evidence attached to the Pre-Trial Brief, or in the opening statement is there any reference to this network and its members. Contrary to the Prosecutor's assertion, in the light of the volume of disclosure, a witness statement cannot, without some other indication, adequately signal to the Accused that the allegation is part of the Prosecution case.

26. The Chamber concludes that the vagueness of the Indictment in relation to the existence and the participation of the Accused in the "*réseau zero*" has not been cured by timely, clear and consistent notice.

27. However, the Chamber is of the view that Witness ZF's evidence is relevant to the proof of other allegations sufficiently pleaded in the Indictment, and in particular the existence of groups affiliated with the alleged "Hutu Power", including the *Akazu*. Contrary to the Defence's contention, the Chamber considers that this hearsay evidence can be admitted and the extent of its probative value does not substantially outweigh the need to ensure a fair trial. The Chamber recalls that the weight to be attributed to the evidence is a different issue to be assessed at a later stage.

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[44] T. 16 May 2006, pp. 18-19.
[45] T. 16 May 2006, pp. 18-19.
[46] Footnote 117, p. 45 pertaining to the following sentence in the text: "In contrast to Karemera's litigious disposition, and Ngirumpatse's calm detachment, Nzirorera simply seems to have generated a reputation as brute and a scoundrel."

28. Consequently, the Chamber finds that Witness ZF's evidence on *réseau zero* is inadmissible to prove the material fact that the Accused participated in this network since they were not put on notice of this allegation. The witness' testimony on this issue is admissible only to the extent that it is related to the existence of the *Akazu*, as pleaded in the Indictment.[47]

b. Meetings held by Ngirumpatse from 1992 to late 1993 and meetings of military and civilian authorities at a certain location throughout 1990-1994 in Gisenyi

29. Witness ZF testified that Ngirumpatse held two meetings at the MRND palace in the Gisenyi *préfecture* during 1992 and 1993, where the conduct of the *Interahamwe* militia in the Gisenyi *préfecture*, their discipline, their support to the Rwandan armed forces and to the Gisenyi gendarme were discussed.[48] The witness also testified to five meetings held at a certain location in the same *préfecture* between 1990 and 1994.[49] According to the witness, Nzirorera attended one of these meetings, in the second half of 1992, and said that "a Tutsi would not succeed in their unimaginable dream, and that he agreed with [Colonel Bagosora] that they should not be left to go on with their plan."[50] Apart from that meeting,[51] the witness did not provide much detail as to the content of the other meetings and only indicated the main participants, which did not include the presence of any of the Accused.

30. The Defence for Nzirorera objected to the admission of these portions of Witness ZF's evidence arguing that these meetings are material facts not contained in the Indictment or Pre-Trial Brief and that sufficient notice had not been given to the Accused.[52] In response, the Prosecutor referred to paragraphs 23 and 24 of the Indictment for the meetings held by Ngirumpatse, but provided no specific references for the meetings at a certain location in Gisenyi between 1990 and 1994.[53] He claimed that the Defence was adequately put on notice since the meetings were mentioned in the Pre-Trial Brief,[54] the summary of the witness'

[47] See para. 6 (iii).
[48] T. 16 May 2006, pp. 24, 28 and 29.
[49] T. 16 May 2006, pp. 54 and seq. The name of the location is kept under seal.
[50] T. 16 May 2006, p. 62.
[51] T. 16 May 2006, p. 61.
[52] T. 16 May 2006, pp. 24-25 and pp. 55-56.
[53] T. 16 May 2006, pp. 25 and 38.
[54] The Prosecution referred to paragraphs 37 and 41 of its Pre-Trial Brief.

anticipated evidence attached to the Pre-Trial Brief, witness statements and Witness ZF's will-say statement.[55]

31. The Chamber notes that nowhere in the Pre-Trial Brief or opening statement is there a reference to a 1990 meeting in Gisenyi. The Accused were not adequately put on notice that this material fact was part of the case against them. In addition, the Prosecution acknowledged that "the 1990 meeting [was] negligible" and "[was] simply to provide a narrative structure for the evidence."[56] There is therefore no reason to admit the evidence of Witness ZF pertaining to a meeting held at a certain location in Gisenyi in 1990 and it should be excluded.[57]

32. Paragraphs 23 and 24 of the Indictment allege that the Accused persons participated in meetings "over the course of several years leading up to and including 1994".[58] Some specific meetings are also pleaded in the subsequent paragraphs of the Indictment.[59] There is, however, no reference to the meetings held by Ngirumpatse at the MRND palace in the Gisenyi *prefecture* during 1992 and 1993 and to the meetings at a certain location in the same *préfecture* 1990 and 1994. The Pre-Trial Brief contains references to meetings from 1992. At paragraph 37, it is said that "GFA, GBU, ZF, among others, will recount that starting in mid-1992, around the same time that the first legitimate multi-party government of Dismas Nsengiyaremye was introduced, MRND leaders at the national, regional and local levels began to organize meetings in their communities." Paragraph 41 of the Pre-Trial Brief specifically mentions that meetings were held at various locations in Gisenyi from the beginning of 1992 "where notable MRND figures at the regional and national levels gathered

[55] T. 16 May 2006, p.56.
[56] T. 16 May 2006, p. 58.
[57] See: T. 16 May 2006, p. 54.
[58] Indictment, paras. 23 and 24:

> 23. Over the course of several years leading up to and including 1994, particularly after 1992, **Édouard KAREMERA, Mathieu NGIRUMPATSE,** and **Joseph NZIRORERA** agreed among themselves, and with the individuals identified in paragraphs 6(i)-(iv), meeting severally at various locations on disparate occasions in the context of their political party and official government activities, to plan and prepare the destruction of Rwanda's Tutsi population, particularly the killing of persons identified as Tutsi and committed acts in furtherance of this agreement.
>
> **Prior to 8 April 1994**
>
> ***Formation of the Interahamwe; meetings & public speeches; financing, military training, stockpiling of firearms and weapons distributions for militias:***
>
> 24. Over the course of 1993 and 1994 **Édouard KAREMERA, Mathieu NGIRUMPATSE,** and **Joseph NZIRORERA** agreed among themselves, and with others, and collectively undertook initiatives that were intended to create and extend their own personal control, and that of the MRND Steering Committee, over an organized, centrally commanded corps of militiamen that would respond to their call to attack, kill and destroy the Tutsi population.

[59] See paras. 24.6, 24.7, 24.8.

to plan their strategies." Paragraph 141 of the Pre-Trial Brief also contains a reference to several meetings held sometime in 1992 in Gisenyi in certain military camps and "that participants included Nzirorera." The summary of Witness ZF's anticipated testimony annexed to the Pre-Trial Brief mentions that the witness will testify to meetings between 1992 and 1994 held in Gisenyi, including in military camps; it enumerates the participants therein, including Nzirorera and Ngirumpatse, and briefly describes the content of these meetings; there are also clear references to specific paragraphs and charges of the Indictment to which those facts correspond. This clear information is consistently confirmed in the witness' statements disclosed prior to the beginning of the trial.[60] In that respect, it must be noted that the Defence acknowledged that the statements describe the meetings in considerable detail.[61]

33. In the Chamber's view, considering the unambiguous information contained in the Pre-Trial Brief, including the summary of Witness ZF's anticipated testimony, the witness statements adequately signalled to the Accused that the allegations on the said meetings were part of the Prosecution case. The Chamber further notes that the Pre-Trial Brief and the numerous witness statements were filed a long time before Witness ZF's testimony.[62]

34. Under these circumstances, the Chamber concludes that the Accused were given timely, clear and consistent notice that the alleged meetings were part of the Prosecution's case against them. The Chamber is also of the view that the Defence has had reasonable opportunity to investigate these allegations. The extent of the defects in the Indictment does not materially prejudice the Accused's right to a fair trial. Accordingly, the Defence objection is dismissed.

c. Nzirorera's presence at a distribution of weapons after 6 April 1994

35. The Defence for Nzirorera requested that Witness ZF's evidence pertaining to the presence of the Accused at a distribution of weapons in late 1993 or early 1994 be excluded since this information does not appear in the Indictment.

36. The Indictment does not plead this specific event but refers to Joseph Nzirorera's direct participation in the distribution of weapons.[63] The summary of the anticipated

[60] Statements of 24 June 1998, 6 and 8 April 2004 and 8 and 10 December 2004, disclosed on 13 April 2005.
[61] T. 16 May 2006, p. 56.
[62] The Prosecution Pre-Trial Brief was filed on 27 June 2005, more than 10 months prior to Witness ZF's testimony.
[63] See: Indictment, paras. 14, 36, 39 and 62.7.

testimony of ZF attached to the Pre-Trial Brief indicates that the witness will testify to distribution of weapons at certain military camps in Gisenyi in 1993 and will recount that "after 6 April 1994 weapons brought in from abroad were distributed to militiamen to reinforce the 42nd battalion, [...] and that this distribution took place in Nzirorera's presence." This unambiguous information was consistently mentioned in the witness' statements disclosed well in advance to the commencement of the trial.[64]

37. In the Chamber's view, the Accused had timely, consistent, and clear notice that the alleged distribution of weapons to which ZF gave evidence was part of the Prosecution's case against them. The Chamber notes that, during his testimony in court, the witness could not recall the exact dates of the distribution of weapons. This is an issue to be addressed when assessing the evidence. Since the Defence has had reasonable opportunity to investigate these allegations, the extent of this defect in the Indictment does not materially prejudice the Accused's right to a fair trial. Accordingly, the Defence objection is rejected.

(ii) On the Objections raised by the Defence Relating to Witnesses XBM's Testimony

38. The Defence for Nzirorera, joined by the Defence for Ngirumpatse and Karemera,[65] objected to the admission of the following evidence adduced during Witness XBM's testimony:

a. A ceremony relating to the installation of Radio RTLM antenna and subsequent distribution of weapons;[66]
b. A meeting at the Mutura communal office in January 1994;[67]
c. A meeting held at the Meridien Hotel in May 1994;[68]
d. Nyundo Massacre.[69]

39. With respect to each of these events, XBM's evidence consisted of a description how the military authorities mobilized and requested the collaboration of civilians and how the civilians cooperated in the attacks against Tutsi population.

40. The Defence argued, and the Prosecution did not dispute, that these material facts were not, as such, contained in the Indictment or in the Pre-trial Brief. The Chamber, however,

[64] See: Statements 6 and 8 April 2004 and 8 and 10 December 2004, disclosed on 13 April 2005
[65] T. 21 June, pp. 38 and 40.
[66] T. 21 June 2006, pp. 38 and 44.
[67] T. 21 June 2006, p. 48.
[68] T. 21 June 2006, p. 49.
[69] T. 21 June 2006, pp. 50-51.

accepts the Prosecution's contention that this evidence is relevant to show the collaboration between military officials and civilians.[70] This allegation is unambiguously part of the Prosecution's case according to the Indictment, the Pre-trial Brief and the summary of the anticipated testimony of several witnesses annexed thereto.[71] Particularly, the summary of the anticipated evidence of Witness XBM indicates that the witness "will testify about cooperation between soldiers and civilians prior [to] and during the massacres". This unambiguous information is confirmed in the statement of Witness XBM which was disclosed as supporting material to the amendment of the Indictment in December 2004, more than a year before the witness testified.

41. The Chamber notes that Witness XBM did not testify that any of the Accused were present at these events. Under these circumstances, the Chamber is satisfied that a restricted admission of this evidence will not infringe upon the rights of the Accused to a fair trial.

42. Witness XBM's evidence concerning the ceremony of installation of Radio RTLM antenna in late 1993 and the subsequent distribution of weapons, Mutura communal office meeting in January 1994, a meeting held at the Meridien Hotel in May 1994 and the Nyundo Massacre is therefore admissible for the sole purpose of showing the collaboration between civilians and military officials.

FOR THE ABOVE REASONS, THE CHAMBER

I. DENIES the Defence Motion for exclusion of Witness XBM's testimony in its entirety and for sanctions against the Prosecution;

[70] T. 21 June 2006, pp. 33, 44, 45, 48, 50, 52.

[71] See: Indictment, paras. 24.3, 36, 62.2, 62.12; Prosecution Pre-Trial Brief, paras. 9 ("*Planning* to take advantage of the political impasse brought on by Habyarimana's death entailed meetings, discussion and coordination among military and civilian authorities over the period 6 – 10 April 1994"), 11 ("After settling in Murambi, Gitarama, on 12 April, having fled the RPF assault on Kigali, the accused and civilian and military authorities comprising the Interim Government *planned* the removal of préfets, *bourgmestres* and military leaders that were deemed to be obstacles to the genocidal program", 14, 18 ("Given the massive scale of the genocidal enterprise, *commission* of the crime required coordination between military and civilian authorities nationwide"), 155 ("But, as it appears from the cumulative testimonies of the many witnesses, Nzirorera, Ngirumpatse and Karemera, worked *hand in hand with other civilian and military authorities* of the Interim Government, and relied on their own networks of communication and control in the MRND party and the territorial administration, to ensure the success of a well coordinated government campaign against the Tutsi of Bisesero", emphasis added); see summary of the anticipated testimony of Witness AKX, ANP, AWE, BDW, XBM and XXQ. These summaries contain references to specific paragraphs of the Indictment where the cooperation between military authorities and civilian is alleged.

II. **GRANTS IN PART** the Defence oral objections on some parts of the testimonies of Witnesses ZF and XBM and **DECIDES** as follows:

1. Witness ZF's evidence on *réseau zero* is inadmissible to prove the material fact that the Accused persons participated in this network for absence of notice. The witness' testimony on *réseau zero* is admissible only to the extent that it is related to the existence of the *Akazu*.

2. Witness XBM's evidence concerning the ceremony of installation of Radio RTLM antenna in late 1993 and the subsequent distribution of weapons, Mutura communal office meeting in January 1994, a meeting held at the Meridien Hotel in May 1994 and the Nyundo Massacre is admissible for the sole purpose of showing the collaboration between civilians and military officials.

III. **DENIES** the remainder of the Defence oral objections.

Arusha, 19 October 2006, done in English.

Dennis C. M. Byron
Presiding

Emile Francis Short
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]