ICTR-98-41-T
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

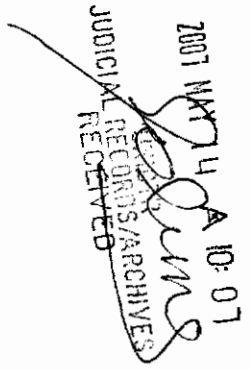
38243
S. Mose

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 11 May 2007



THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. ICTR-98-41-T

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

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid
Kartik Murukutla

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

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 38242

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

BEING SEIZED OF the Bagosora Defence "Requête ... en exclusion de preuve des allégations ne figurant pas dans l'acte d'accusation", filed on 15 May 2006, and its "Erratum à l'Annexe «A» de la Requête", etc., filed on 29 May 2006;

CONSIDERING the Prosecution response and Confidential Annex, filed on 2 June 2006; the Bagosora reply, filed on 19 September 2006; and the Bagosora Confidential Annex, filed on 20 September 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Bagosora Defence requests that the Chamber exclude from its consideration 48 pieces of testimony elicited from numerous Prosecution witnesses on the grounds that the evidence cannot be tied to a material fact contained in the Indictment. It further argues that the evidence lacks relevance and that its prejudicial effect outweighs any probative value. In the Defence's view, the Chamber's approach of admitting evidence in the interests of judicial economy and leaving the determination of weight to a later stage was erroneous and has left the Defence unable to object to numerous pieces of testimony and documentation that were tendered into evidence until this late stage of the trial. As a result of these errors, the Accused has suffered severe prejudice.

2. The Prosecution opposes the requests for exclusion. It asserts that the material facts at issue were either sufficiently pleaded in the Indictment or that any deficiencies were cured by subsequent timely, clear, and concise notice. It argues that the Accused has been well aware of the allegations against him, as evidenced by his attempt to respond to the allegations. Consequently, the Defence has suffered no prejudice.

DELIBERATIONS

(i) Applicable Principles

3. The Chamber has previously enunciated the framework for deciding motions requesting exclusion of evidence on the basis that the evidence falls outside the scope of the indictment.[1] However, in light of the Appeals Chamber Decision relating to exclusion of evidence in this case and other recent jurisprudence addressing specificity in pleading and curing of defects in the indictment, the Chamber finds it useful to review the general framework and to make modifications where necessary.[2]

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[1] *Bagosora et al.*, Decision on Ntabakuze Motion for Exclusion of Evidence (TC), 29 June 2006 (hereinafter "Ntabakuze Trial Chamber Decision"); *Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006; *Bagosora et al.*, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006.

[2] *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 (hereinafter "Appeals Chamber Decision"), paras. 19, 24-26, 45-48. In its decision, the Appeals Chamber found

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4. Rule 89 (C) of the Rules of Procedure and Evidence provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". This rule is limited, however, by the Trial Chamber's obligation to ensure that an accused has proper notice of the case against him or her in accordance with Article 20 of the ICTR Statute. In *Kupreškić*, the Appeals Chamber interpreted Article 20 of the similarly worded ICTY Statute as placing "an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven".[3] The appropriate enquiry is whether the indictment sets out the material facts of the Prosecution case in sufficient detail "to inform an accused clearly of the charges against him or her so that the accused may prepare a defence".[4] Allegations of physical perpetration of a criminal act by an accused must appear in an indictment.[5] The legal basis for which an individual is being charged, meaning individual criminal responsibility under Article 6 (1) of the Statute or command responsibility under Article 6 (3), must also be explicitly set forth in the indictment.[6]

5. Determining the materiality of a particular fact and the specificity required in pleading depends on the nature of the Prosecution case:

> 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'. However, 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'. 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.[7]

6. Defects in an indictment may be "cured" if the Prosecution subsequently provides the accused with "timely, clear and consistent information detailing the factual basis underpinning the charges against him or her".[8] Omission of a count or charge from the indictment cannot be cured but "omission of a material fact underpinning a charge in the indictment can, in certain cases, be cured by the provision of timely, clear and consistent information".[9] The Appeals Chamber has also clarified that curing is an "exceptional" measure, regardless of whether the Prosecution knew of the material facts at the time the indictment was filed and simply failed to plead them or whether the Prosecution subsequently

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that the Trial Chamber was aware of the applicable legal principles for the exclusion of evidence but had erred on two points. First, the Appeals Chamber instructed the Trial Chamber to reconsider whether the burden of proof had been appropriately placed on the Defence in instances where the Defence had not made a contemporaneous objection for lack of notice to the evidence at the time it was introduced. Second, the Trial Chamber failed to consider whether the totality of the defects in the Indictment, even though cured, nonetheless prejudiced the Accused's right to a fair trial by hindering the preparation of a proper defence.

[3] *Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 88.

[4] *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 23.

[5] *Bagosora et al.*, Ntabakuze Trial Chamber Decision, para. 5; *Bagosora et al.*, Appeals Chamber Decision, para. 33.

[6] *Bagosora et al.*, Appeals Chamber Decision, para. 27 (citing *Krnojelac* Appeals Judgement).

[7] *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 24 (relying on *Kupreškić et al.* Appeals Judgement).

[8] *Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 114; *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 26.

[9] *Bagosora et al.*, Appeals Chamber Decision, para. 29.

discovered the information during the course of the case.[10] In both instances, the risk of prejudice to the Accused is the same, as is the relevant enquiry of whether the Accused has been provided with timely, clear, and consistent information enabling him or her to investigate and prepare a proper defence.[11] The Trial Chamber has an obligation to determine whether a vague provision in an indictment has been cured by timely, clear, and consistent information from the Prosecutor.[12]

7. Finding that a defect in the indictment has been cured depends on "whether the accused was in a reasonable position to understand the charges against him or her".[13] The presence of a material fact somewhere in the Prosecution disclosures during the course of a case does not suffice to give reasonable notice; rather, it must be evident that the material fact will be relied upon as part of the Prosecution case.[14] Mere service of witness statements by the Prosecution as part of its disclosure requirements is generally insufficient to provide notice to an Accused.[15] However, the Prosecution pre-trial brief (together with any annexes and charts of witnesses) and the Prosecution's opening statement are adequate sources of disclosure.[16] The Appeals Chamber has confirmed that a defect in the indictment may also be cured through a Prosecution motion for the addition of a witness, "provided any possible prejudice to the Defence was alleviated by, for example, an adjournment to allow the Defence time to prepare for cross-examination of the witness".[17] The Appeals Chamber further recognized that defects in an indictment "may arise at a later stage of the proceedings because the evidence turns out differently than expected".[18] In these instances, the Chamber must assess the timing of the information designed to cure the defect, the impact of the newly-discovered information on the Prosecution case, and the importance of the new information to the ability of the accused to prepare his or her defence.[19] The Chamber must then decide "whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment".[20]

8. As the Chamber has previously held in this case, "[o]bjections 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".[21] Objections must be specific and timely. Ordinarily, this means that an objection should be raised at the time impugned evidence is sought to be introduced.

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[10] *Bagosora et al.*, Ntabakuze Trial Chamber Decision, para. 4; *Bagosora et al.*, Appeals Chamber Decision, paras. 21-22.

[11] *Bagosora et al.*, Appeals Chamber Decision, para. 21.

[12] *Ntagerura et al.*, Judgement (AC), 7 July 2006, para. 65 (holding that the Trial Chamber erred in failing to consider whether defects in the indictment had been cured).

[13] *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 27.

[14] *Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 7 (referencing the *Muvunyi* Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, para. 22).

[15] *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 27 (citations omitted). *See also Niyitegeka*, Judgement (AC), 9 July 2004, para. 197 (citations omitted).

[16] *Bagosora et al.*, Appeals Chamber Decision, para. 35 (referencing the Appeals Chamber Judgements in *Kupreškić et al., Kvočka et al., Kordić & Čerkez, Naletilić & Martinović, Ntakirutimana, Gacumbitsi*).

[17] *Id.*, para. 35.

[18] *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 25.

[19] *Bagosora et al.*, Appeals Chamber Decision, para. 35 (referencing the *Niyitegeka* Appeals Judgement).

[20] *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 25. *See also* Appeals Chamber Decision, para. 37 (affirming that, in these situations, the Trial Chamber must determine "which measure(s) are required in the circumstances of the case to preserve the fairness of the proceedings").

[21] *Bagosora et al.*, Ntabakuze Trial Chamber Decision, para. 7; *Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, para. 9; *Bagosora et al.*, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 8.

However, the Appeals Chamber has noted that it is not always possible to do so and has clarified that the timeliness of an objection depends on the precise circumstances of the situation:

> [W]hen an objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused's ability to defend himself has been materially impaired. In doing so, the Trial Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced and whether the Defence has shown that the objection was raised as soon as possible thereafter.[22]

9. The Chamber must also assess the cumulative effect of all of the remedied defects and determine whether the totality of these defects in the indictment, even if cured, has rendered the trial unfair.[23] As noted by the Appeals Chamber:

> The Appeals Chamber agrees that when the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial 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 prejudice an accused's right to a fair trial by hindering the preparation of a proper defence.[24]

(ii) Application: Specific Exclusion Requests

(a) Witness A

10. The Defence objects to the testimony of Prosecution Witness A that the Accused showed Jean Kambanda a list of Tutsis to be killed and supplied arms to *Interahamwe* on 12 April 1994 at the request of Joseph Nzirorera.[25] The Chamber finds no objection on the record for lack of notice, and the Defence reply confirms that the issue was first raised in its motion for exclusion. Given the incriminating nature of Witness A's testimony, the Chamber finds that the Defence should have made an objection during or very near in time to the witness' testimony. Its failure to do so means that the Defence now bears the burden of proof to demonstrate that it lacked notice of these allegations and that it has suffered prejudice. The Defence has failed to meet its burden.

11. Paragraph 5.1 of the Indictment names the Accused as part of a group of persons who, from late 1990 until July 1994, devised a plan consisting of "among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated". Paragraphs 5.36 to

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[22] *Bagosora et al.*, Appeals Chamber Decision, para. 45.
[23] *Id.*, paras. 26, 48.
[24] *Id.*, para. 26.
[25] Motion, Annex A, p. 1 (entry nos. 1-2). *See also* T. 1 June 2004 pp. 45-46, 70. The witness testified from 1 to 4 June 2004.

5.40 and 6.34 elaborate on the establishment and use of lists in the killing of Tutsis.[26] The Accused had adequate notice of the allegation that he was involved in the preparation and distribution of such lists.[27] Consequently, the evidence is admissible.

12. The same conclusion applies to Witness A's testimony concerning the Accused's involvement in the distribution of weapons to *Interahamwe* and militiamen. Paragraphs 5.1, 5.18, 5.26, 5.28, 5.29, and 5.30 of the Indictment all refer to distribution of weapons. Paragraph 5.28 directly alleges that the Accused and others "distributed weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its accomplices" before and during the events of April 1994. It would have been impracticable to plead each instance in which the Accused distributed or was involved in the distribution of weapons with more specificity given the sheer scale of events. Consequently, the evidence is admissible.

(b) Witness ABQ

13. The Defence seeks to exclude Prosecution Witness ABQ's testimony concerning Bagosora's participation in two meetings in Gisenyi in June 1994.[28] The first meeting of high-level authorities occurred at the *Hôtel Méridien*, where the Accused allegedly expressed anti-Tutsi sentiments and ordered Anatole Nsengiyumva to find a Tutsi bank employee to secure financing for the army to fight the enemy.[29] The second gathering involved army recruits at the Umuganda Stadium, where Bagosora allegedly gave a speech to encourage fighting of the enemy.[30]

14. The Chamber finds that the Defence failed to make a contemporaneous objection to the testimony of this witness, which is confirmed by the Defence reply. Without having articulated a reason for its failure to object earlier, the Defence bears the burden of proof to establish prejudice in the preparation of its defence.

15. The Indictment makes reference to numerous meetings involving the Accused but not to the meetings described by Witness ABQ.[31] Any defect in the Indictment was subsequently cured, however, through the Prosecution motion of 24 March 2004, seeking to add Witness ABQ to its witness list.[32] The motion included a summary of the witness' purported testimony and a copy of his prior written statement, both of which elaborated on these two events in detail.[33] The Prosecution motion stated:

> 18. Witness ABQ also has information about a meeting at Hotel Meridien with more than 30 people in attendance, including the accused Bagosora and Nsengiyumva, plus Major Kabera, Barnabé Samvura, Mabuye, and Omar Serushago, sometime in May/June 1994. During that meeting, witness ABQ heard the accused Bagosora explaining that people should

[26] Indictment, para. 5.37.
[27] *Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 88 (holding that Article 20 places "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").
[28] Motion, Annex A, p. 2 (entry nos. 3-4). The witness testified from 6 to 9 September 2004.
[29] T. 6 September 2004 pp. 23-28.
[30] *Id.* pp. 28-32.
[31] *See, e.g.*, Indictment, paras. 6.3, 6.4, 6.7, 6.8, 6.13, 6.14, 6.24, 6.29, and 6.69.
[32] *Bagosora et al.*, 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, paras. 17-19.
[33] Witness ABQ's written statement was subsequently admitted into evidence as Defence Exhibit D. NS 54B on 8 September 2004.

> not help Tutsi to cross the border because Tutsi are the one who will come back one day to kill the Hutu and that the Hutu made a mistake in 1959 by letting the children go, giving the example of FPR General Rwigema, who was a child when his parents fled. At the same meeting, witness ABQ heard the accused Bagosora ordering the accused Nsengiyumva to organize a search for the wife of one Longin Sherif, who was cashier at the Banque de Kigali, because she had one of the codes for the bank safe and was in hiding. Witness ABQ learnt that the accused Nsengiyumva found that woman the following day and the latter was killed after the codes [were] used to open the bank safe.
>
> 19. Witness ABQ also has information about the accused Bagosora and Nsengiyumva being involved in the distribution of weapons to members of the Interahamwe at the Umuganda Stadium sometime in June 1994 and the same members of the Interahamwe being sent to Bisesero in Kibuye on ONATRACOM buses where they participated in the killing of Tutsi civilians who had sought refuge on the Bisesero hills.[34]

16. In its decision of 21 May 2004, the Chamber concluded that the evidence was admissible:

> The Chamber considers that the proposed testimony has probative value and is material to the Prosecution's case against the Accused Bagosora and Nsengiyumva. The lateness of the application has been weighed against the materiality of the testimony, and the fact that the Defence had notice of the witness's evidence in July 2003. Having considered all the relevant factors, the Chamber finds that it would be in the interests of justice to add Witness ABQ.[35]

17. The Chamber also notes that the Prosecution motion to add Witness ABQ, through which it found notice to be provided to the Defence, was filed on 24 March 2004 and that the witness first testified on 6 September 2004. The lapse of more than five months gave the Defence adequate time to investigate these allegations and prepare its defence. Consequently, the testimony of Witness ABQ is admissible.

(c) Witness ATY

18. The Defence requests the exclusion of the testimony of Prosecution Witness ATY that the Accused: (i) threatened a man named Madorane not to leave the MRND political party; (ii) forced the man to resign from his employment; and (iii) came to his house on the evening of 7 April 1994 and was informed by Madorane's children that their parents had been killed.[36] The Defence also objects to Witness ATY's testimony that a Presidential Guard captain informed the witness that the Accused gave the captain a list of persons to be killed in the Kiyovu neighbourhood (including the witness), and that the captain received orders from the Accused to arrest and execute the Prime Minister.[37] Prior to the witness' testimony on 27 September 2004, the Defence objected for lack of notice to certain new allegations disclosed by the Prosecution in a will-say statement two days prior to the witness' testimony.[38] However, as the Defence did not identify these new allegations, it is not possible for the

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[34] *Bagosora et al.*, 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, paras. 18-19.

[35] *Bagosora et al.*, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 *bis* (E) (TC), 21 May 2004, paras. 17-19.

[36] Motion, Annex A, pp. 2-4 (entry nos. 5, 6, 9). *See also* T. 27 September 2004 pp. 11-12, 24-25. The witness testified on 27 and 28 September 2004.

[37] Motion, Annex A, pp. 2-4 (entry nos. 7-8). *See also* T. 27 September 2004 pp. 23-24.

[38] T. 27 September 2004 pp. 2-4. The Chamber allowed the examination-in-chief to proceed and stated that it would deal with any issues of notice as they might arise during questioning. The Defence did not make any specific objection in connection with the testimony on the events now at issue. This would normally place the burden of proof on the Defence to demonstrate prejudice.

Chamber to determine whether the objection on the record relates to the same matters presently before the Chamber.

19. The first three events testified to by Witness ATY cannot be traced to the Indictment. However, notice of these allegations was given to the Defence by way of the Prosecution Pre-trial Brief, filed on 21 January 2002, which includes summaries for potential Prosecution witnesses. This document contained a summary of proposed testimony for Witness ATY, which specifically described these three allegations.[39]

20. In the Chamber's view, the Defence also had notice of the other two incidents concerning information conveyed to the witness by the Presidential Guard captain. The Indictment repeatedly makes reference to the preparation and use of lists of people to be eliminated – Tutsis and moderate Hutus – and directly alleges the Accused's involvement in the making, distributing, and overseeing of such lists.[40] The Indictment further alleges that the Accused held meetings in the early hours of 7 April 1994 and assisted in the planning and ordering of political assassinations, including that of the Prime Minister Agathe Uwilingiyimana.[41] The Chamber finds the Indictment to have provided the Defence with sufficient notice of the allegations. Nonetheless, the Chamber notes that additional information was conveyed to the Defence through the Pre-trial Brief and the Supporting Material.[42] The evidence is therefore admissible.

(d) Witness BY

21. The Defence objects to Prosecution Witness BY's testimony that the Accused furnished arms to the *Interahamwe* on 12 April 1994 at the request of Joseph Nzirorera.[43] As the Defence made no objection to this testimony until the present motion and has not provided any justification for the delay, it bears the burden of proof.

22. As discussed previously in connection with Witness A, the Indictment gave notice to the Accused that he is charged with distributing weapons to *Interahamwe*. Paragraphs 5.1, 5.18, 5.26, 5.29, and 5.30 of the Indictment all refer to the distribution of weapons, and paragraph 5.28 makes a direct allegation against the Accused.[44] It would have been

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[39] *Bagosora et al.*, Prosecution Pre-trial Brief, filed on 21 January 2002, Appendix A, p. 14. Witness ATY was formerly known as Witness BA and appears under this pseudonym in the Pre-trial Brief. Details of the witness summary are not reproduced here in order to avoid disclosure of the witness' identity.

[40] *See, e.g.*, Indictment, paras. 5.1, 5.36-5.40.

[41] *See, e.g.*, Indictment, paras. 1.23, 1.24, 4.2, 6.8, 6.34.

[42] Prosecution Pre-trial Brief, Appendix A, p. 62. The summary for Witness DT provides: "Witness will state that the killings began immediately after the plane crashed on 6th April 1994. On the morning of 7th April 1994 at about 8h00 wit[ness] met Sgt Hakizimana from the Camp of the Presidential Guard ... In command of a company moving towards le Quartier Ministeriel. Hakizimana told the witness that they were going to find and arrest certain high authorities on an order from Bagosora ... In front of Agathe's house the witness met a military group led by Semana and Niyonezima from the camp of the Presidential Guard. Semana told witness that they were there to kill Agathe, her husband, her adviser, Ignace [Madorane] and others on the list that emanated from Bagosora." *See also* Supporting Material, pp. 27-28, 91-93.

[43] Motion, Annex A, p. 4 (entry no. 10). *See also* T. 5 July 2004 pp. 11, 17-18. The witness testified on 2 July and 5-9 July 2004.

[44] Paragraph 5.28 of the Indictment alleges: "Before and during the events referred to in this indictment, Augustin Bizimana, Théoneste Bagosora, Protais Mpiranya, Anatole Nsengiyumva, Aloys Ntabakuze and others distributed weapons to militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its 'accomplices'."

impracticable to plead each instance in which the Accused distributed or was involved in the distribution of weapons. Consequently, the evidence is admissible.

(e) Witness DA

23. The Defence challenges the testimony of Prosecution Witness DA that Bagosora sent a telegram to Captain Sagahutu on the morning of 7 April 1994, instructing him to use all possible means to assassinate the Prime Minister.[45]

24. The Prosecution learned new information from Witness DA during his preparation in Arusha, just days before he was scheduled to testify. The Prosecution notified the parties that the witness would testify that Captain Sagahutu received a radio transmission from Colonel Bagosora on the morning of 7 April 1994 "regarding the disposition of Prime Minister Agathe Uwilingiyimana".[46] The Bagosora Defence filed a motion seeking to preclude the witness from testifying on these new matters.[47] The Defence also made an objection for lack of notice at the time the evidence was offered by the witness on 17 November 2003.[48] The Chamber heard extensive arguments on the issue by the parties and issued its ruling two days later. Finding that the evidence at issue was, in fact, new and had not previously been disclosed to the Defence, the Chamber granted the Defence a two week adjournment to prepare its cross-examination of the witness.[49] The witness completed his testimony on 10 December 2003.

25. In a situation where the evidence turns out differently at a later stage of trial, the Chamber has discretion to decide the manner in which to proceed.[50] In this instance, the Chamber weighed the impact of the newly discovered information on the parties' respective cases and determined that a short adjournment was sufficient to remedy any potential prejudice to the Accused. Consequently, the Defence was given an adequate amount of time to respond to the new allegations.[51] The evidence is admissible.

(f) Witness DAS

26. The Defence seeks to exclude Prosecution Witness DAS' testimony that the Accused was seen at roadblocks in Kiyovu on at least four occasions between mid-April and the end of June 1994, in the presence of other civilian and military personnel. During these visits, the Accused is alleged to have either witnessed the killing of Tutsis or encouraged such killings.[52]

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[45] Motion, Annex A, p. 4 (entry no. 11). *See also* T. 17 November 2003 pp. 32-34. The witness testified from 17 to 19 November 2003 and on 5, 8, and 10 December 2003.

[46] *Bagosora et al.*, Memorandum from the Prosecution to the Defence Teams re: Notification of Anticipated Evidence of Witness DA, etc., filed on 12 November 2003, para. 4. The Prosecution also sent this memorandum to the parties by email on 11 November 2003.

[47] *Bagosora et al.*, Motion by the Defence for Théoneste Bagosora Requesting the Exclusion of Certain Facts from the Anticipated Testimony of Witness DA, filed on 13 November 2003.

[48] T. 17 November 2003 pp. 33-36.

[49] T. 19 November 2003 p. 37.

[50] *Naletilić & Martinović*, Judgement (AC), 3 May 2006, para. 25.

[51] The Chamber notes that a summary of Witness DA's testimony, including his accompanying Captain Sagahutu on the morning of 7 April 1994 to the house of the Prime Minister and his witnessing of her dead body, was contained in the Supporting Material and the Prosecution Pre-trial Brief. *See* Supporting Material, p. 127; Prosecution Pre-trial Brief, Appendix A, pp. 32-33.

[52] Motion, Annex A, pp. 4-5 (entry no. 12). *See also* T. 5 November 2003 pp. 19-51. The witness testified from 4 to 7 November 2003.

27. Both the Bagosora and Nsengiyumva Defence teams raised contemporaneous objections on the record to an incident alleged to have occurred on 2 May 1994.[53] However, the Chamber overruled the objections and allowed questioning on the event, based on several provisions in the Indictment.[54] Furthermore, the Chamber notes that the summary for Witness DAS in the Prosecution Pre-trial Brief indicates that he would testify about killings at roadblocks and his specific observations of Bagosora and Nsengiyumva, including an incident at a major roadblock where Bagosora allegedly gave an order not to spare any Tutsis.[55] The Chamber finds that its ruling that the evidence is admissible is consistent with its decision on a similar request for exclusion made from the Nsengiyumva team concerning similar testimony by the witness.[56]

(g) Witnesses DBQ, LN, DBN, and XAB

28. The Defence requests the exclusion of testimony by Prosecution Witnesses DBQ, LN, DBN, and XAB relating to a series of meetings held at Kanombe Camp on the 6, 7, and 8 April 1994, involving the presence of the Accused Bagosora and Ntabakuze.[57] Witnesses DBQ and LN testified that the Accused held a meeting at Kanombe Camp late on the evening of 6 April 1994 after the presidential crash.[58] Witness DBN testified that the Accused met with Ntabakuze at Kanombe Camp on the morning of 7 April 1994 and again in the afternoon on 8 April 1994.[59] Witness XAB stated that the Accused was seen in Ntabakuze's office at Kanombe Camp on the morning of 8 April 1994.[60]

29. Though the Indictment makes no reference to these specific meetings at Kanombe Camp, numerous meetings are alleged to have occurred in Kigali and surrounding areas in the early hours and days after the presidential assassination.[61] The Supporting Material provides further precision concerning meetings at Kanombe Camp.[62] The Prosecution Pre-trial Brief also provides additional details in support of these meetings.[63] This additional information

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[53] T. 5 November 2003, pp. 22, 24. Their objection was based on a fifth written statement of the witness, DAS-5, describing the 2 May 1994 incident, which the Prosecution disclosed late. *See also Bagosora et al.*, Defence Notice of Intended Objection to Elements of Testimony of Witness DAS, filed on 5 November 2003 by the Nsengiyumva Defence; *Bagosora et al.*, Requête aux fins de rejet des nouvelles déclarations du témoin DAS, filed on 3 November 2003 by the Kabiligi Defence.

[54] T. 5 November 2003 pp. 36-38. The Chamber found that paragraphs 6.27, 6.28, 6.31, 6.43, 6.46 to 6.50, 6.66, and 6.72 of the Indictment provided sufficient reference to the allegations.

[55] Prosecution Pre-trial Brief, Appendix A, p. 37.

[56] *See Bagosora et al.*, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, paras. 20-21. The Chamber admitted testimony by Witness DAS that Nsengiyumva was also seen at roadblocks in the Kiyovu neighborhood while killings were being carried out by soldiers and *Interahamwe*.

[57] Motion, Annex A, pp. 5-6, 8-10 (entry nos. 13-14, 15, 25, and 28).

[58] T. 23 September 2003 pp. 17-18 and T. 30 March 2004 pp. 60-61 (Witness DBQ); T. 31 March 2004 p. 77 (Witness LN). Witness DBQ testified on 23, 26, 29, and 30 September 2003 and then again on 25, 29, and 30 March 2004. Witness LN testified from 30 to 31 March and on 1 April 2004.

[59] T. 31 March 2004 pp. 75-78; T. 1 April 2004 p. 58. The witness testified on 31 March and 1, 5, and 6 April 2004.

[60] T. 6 April 2004 pp. 44-45. The witness testified from 6 to 7 April 2004.

[61] *See, e.g.*, Indictment, paras. 6.3, 6.4, 6.5, 6.7, 6.8, 6.13, 6.14, 6.24, 6.25.

[62] Supporting Material, pp. 51 (Witness DP), 52 (Witness BC), 128 (Witness LN).

[63] *Witness DBQ*: "On 6 April, Witness was at the camp. The alert was given and every one stayed on alert. Ntabakuze left with member of the CRAP and went to plane crash site at President's house. Ntabakuze came back around 23 h. Then he went into a meeting with officers at the camp." Prosecution Pre-trial Brief, Appendix A, p. 46. *Witness LN*: "On the night of the plane crash, Presidential Guard and some Interahamwe militiamen

cured any defect in the Indictment and gave notice of the allegations to the Accused. Moreover, the Chamber postponed the testimony of Witnesses DBQ and DBN in order to eliminate any potential prejudice due to new elements in the witnesses' respective testimonies and the late disclosure of information by the Prosecution.[64] Consequently, the evidence is admissible.

(h) Witness DBY

30. The Defence seeks to exclude the testimony of Prosecution Witness DBY concerning two telegrams sent by the Accused at the end of 1992: the first on behalf of the Ministry of Defence to a military base requisitioning 1,000 guns which the witness later saw in the *Interahamwe*'s possession; and the second to all army units in the country identifying the Tutsi population as the enemy and leading to the dismissal of all Tutsis from the army.[65]

31. As noted by the Prosecution, the admissibility of this testimony has already been extensively litigated. In a written decision dated 18 September 2003, the Chamber rejected the argument that the evidence was inadmissible for falling outside the temporal scope of the Tribunal. Instead it found that the proposed testimony of Witness DBY concerning the two telegrams to be admissible, reasoning that the evidence may reveal an ongoing criminal plan that "began prior to 1994 but whose object was only realized in 1994" and may provide context or background for the crimes committed in 1994.[66] The Chamber further recalls that the summary for Witness DBY contained in the Prosecution Pre-trial Brief also referenced these telegrams.[67] Consequently, the Defence had notice of the evidence, and the testimony is admissible.

(i) Witness DCB

32. The Defence moves the Chamber to exclude Prosecution Witness DCB's testimony that the Accused made two visits to the Presidential Guard's Camp Kimihurura in April 1994 to meet with Major Mpiranya, the camp commander, on 7 April 1994 and then again later that month.[68] During the witness' testimony, the Defence objected to the second sighting of

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started to massacre Tutsi around the President's residence. Around midnight, Corporal Masitumu, bodyguard of Lt. Colonel Baransaritse, told the witness that a meeting chaired by Colonel Bagosora was taking place inside the hospital, with the attendance of Lt. Colonel Baransaritse; Major Ntabakuze; Major Ntibihora; Major Mutabera." *Id.*, pp. 95-96. *Witness DBN*: "Says that Bagosora stayed at Kanombe camp. Says that Bagosora saw people being killed and houses burnt but never said anything." *Id.*, pp. 44-45. *Witness XAB*: "Witness was in the Para Commando Battalion. Witness will state that on the 7th April 1994 around 7.30 a.m. he attended a meeting chaired by Ntabakuze. Ntabakuze informed the soldiers of the death of Habyarimana and stated that the soldiers had to avenge his death because he had been a good leader." *Id.*, p. 138.

[64] T. 16 December 2003 p. 91. The Chamber ordered the postponement of Witness DBN's testimony for sixty days to allow the Defence time to prepare to meet the new allegation. *See also Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 27. The Chamber ruled that the witness could testify as scheduled about subjects of which the Defence had notice but that testimony on the late disclosed will-say statements could not take place until the following trial session. In actuality, Witness DBQ's testimony was adjourned on 30 September 2003 and recommenced on 25 February 2004.

[65] Motion, Annex A, p. 6 (entry nos. 16-17). *See also* T. 22 September 2003 pp. 7-9. The witness testified on 12 and 22 September 2003.

[66] *Bagosora et al.*, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, paras. 5-6, 20-21, 30-32.

[67] Prosecution Pre-trial Brief, Appendix A, p. 47.

[68] Motion, Annex A, pp. 6-7 (entry no. 18). *See also* T. 6 February 2004 pp. 2-6, 29. The witness testified on 5 and 6 February 2004.

the Accused in late April 1994 on the basis of lack of notice.[69] The Chamber allowed the questioning to proceed.[70] In these circumstances, the Prosecution bears the burden of proof to demonstrate that the Accused was not prejudiced in the preparation of his defence.

33. The Indictment alleges that the Accused conspired, amongst others, with Major Mpiranya and used the Presidential Guard to carry out the co-conspirators' plan to eliminate the Tutsi population and any members of the opposition.[71] Paragraph 6.34 of the Indictment refers to a meeting on the morning of 7 April 1994, after which the Accused ordered groups of soldiers – including the Presidential Guard – to begin assassinations of persons whose names appeared on a list. Paragraph 6.69 describes daily meetings of the co-conspirators, including the Accused and Mpiranya, from April to July 1994 to remain informed about the progress of the massacres. However, no express mention of these two meetings is made in the Indictment.

34. The Prosecution Pre-trial Brief nonetheless cured any defect in the Indictment regarding the first meeting between the Accused and Mpiranya through the summary for Witness DCB, which provided that "in the morning of 7 April, he saw Bagosora in uniform at the camp of the GP".[72] As for the second meeting, the Chamber has already ruled that the evidence is not as incriminating in that it is similar to the first observation by the witness and that it requires little additional investigation, if any.[73] When read in conjunction with paragraph 6.69 of the Indictment, the Chamber finds the Defence had notice of this second meeting between the Accused and Mpiranya. Consequently, Witness DCB's testimony about both incidents is admissible.

(j) Witness DCH

35. The Defence requests the exclusion of Prosecution Witness DCH's testimony concerning three events: (i) at the end of 1992, Bagosora attended a meeting at Camp Butotori where he encouraged killings of Tutsis; (ii) in late May or early June 1994, Bagosora attended a meeting convened by Renzaho at the *Hôtel du 5 Juillet* to discuss the security situation in Kigali; and (iii) in June 1994, the witness went to the *Hôtel des Mille Collines*, where he was instructed by the Accused to take a group of Tutsis from the hotel to be killed.[74]

36. During the witness' testimony, several defence teams objected on the grounds of lack of notice – including the Bagosora team.[75] The Chamber addressed the objections of the Nsengiyumva Defence because the objections related to immediate testimony by the witness against the Accused Nsengiyumva but deferred a ruling on the objections of the other Defence teams until evidence was actually led against their respective clients.[76] In light of the

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[69] T. 6 February 2004 p. 6.
[70] *Id.* p. 9.
[71] *See, e.g.*, Indictment, paras. 5.1, 5.42, 5.43, 6.8, 6.9, 6.22, 6.37, 6.38, 6.41, 6.50, 6.51, 6.57, 6.62, 6.64.
[72] Prosecution Pre-trial Brief, Appendix A, p. 48.
[73] T. 6 February 2004, p. 28.
[74] Motion, Annex A, p. 7 (entry nos. 19-21). The witness testified on 18, 22-25, and 28-30 June 2004. See also 23 June 2004 pp. 38-40 (1st event); T. 22 June 2004 pp. 67-70 (2nd event); T. 22 June 2004 pp. 72-76 (3rd event).
[75] T. 22 June 2004 pp. 35-36, 43-44, 46-47.
[76] *Id.* pp. 48-49. *See also Bagosora et al.*, Decision on Defence Motion to Preclude Portions of the Anticipated Testimony of Prosecution Witness DCH, for the Postponement of Witness DCH's Testimony, and For the Appointment of Defence Counsel for DCH (TC), 29 March 2004, para. 7. The Chamber noted that all of the Defence teams had previously sought exclusion of testimony by Witness DCH on two written statements that

Defence's timely objection, the burden of proof to show that the Accused had notice of these allegations rests with the Prosecution.

37. The Indictment makes no specific mention of these incidents, although it contains general allegations that the Accused made speeches inciting violence against the Tutsis and attended meetings to plan the killing of Tutsis and moderate Hutu opponents.[77] Paragraph 1.16 of the Indictment, referring to the period of 1992 and 1993 leading up to the genocide, provides that "political and military figures publicly appealed to hatred and fear of the Tutsi and urged the Hutu majority to 'finish off the enemy and its accomplices'". Read in conjunction with paragraph 5.1 of the Indictment, outlining the conspiracy between the Accused Bagosora and others and the implementation of their plan to foster hatred and ethnic violence, the Chamber finds that the Defence had sufficient notice of the first incident.

38. The Chamber also finds that the Defence had notice of the second incident involving the Accused's attendance at a meeting in May or June 1994 at the *Hôtel du 5 Juillet*. Paragraph 6.69 of the Indictment provides that the Accused and other officers of the General Staff of the Army participated in "daily meetings at which they were informed of the massacres of the civilian Tutsi population" from April to July 1994. Read in conjunction with paragraph 5.1 of the Indictment, which mentions Renzaho as one of the co-conspirators of the Accused, the Chamber concludes that the Defence had adequate notice of this second alleged meeting.

39. The third, highly incriminating incident mentioned by Witness DCH was about a direct order from Bagosora to have Tutsis taken away and killed. The Appeals Chamber has held that material facts which concern the actions of the Accused personally should be clearly and specifically pleaded in the indictment and will be scrutinized more closely than general allegations of criminal conduct.[78] The Chamber does not find the defect in the Indictment to have been cured by the Supporting Material or the Prosecution Pre-trial Brief since the summary for Witness DCH never even mentions Bagosora. The Chamber rejects the Prosecution argument that disclosure of the witness' prior written statements, including one where, during a meeting at the *Hôtel des Mille Collines* in June 1994, the Accused is said to have ordered the witness and others "to go to Gisenyi and transport *Interahamwe* to Kigali" was sufficient to place the Accused on notice.[79] Consequently, Witness DCH's testimony on the third incident is excluded.

(k) Witness FW

40. The Defence asks the Chamber to exclude Prosecution Witness FW's testimony concerning the Accused's visit to the Islamic Cultural Centre with other soldiers in May 1994.[80] While at the Centre, the witness heard Bagosora order his companions to be "vigilant

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were disclosed late by the Prosecution. It held that exclusion was not the appropriate remedy and rather that it needed to ensure that the Defence had a reasonable opportunity to evaluate and investigate the evidence. Because the witness was not scheduled to testify in the upcoming trial session, the Chamber did not find "that the Accused are prejudiced by the late disclosure of these statements and will allow testimony arising from them".

[77] *See, e.g.*, Indictment, paras. 5.4, 5.5, 5.8, 5.12, 5.13, 6.3, 6.4, 6.7, 6.8, 6.13, 6.14, 6.24, 6.29, and 6.69.

[78] *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. 33.

[79] Statement DCH-8, dated 6 March 2004, p. 16, admitted as Exhibit DK 67B on 24 June 2004.

[80] Motion, Annex A, p. 8 (entry no. 22).

because the *Inyenzis* could attack that place any time."[81] Prior to Witness FW's testimony about this event, the Defence lodged an objection on the grounds that it had no notice of the witness' purported testimony until 3 October 2003, approximately one month prior to his actual appearance before the Tribunal, when the Prosecution transmitted its will-say statement for the witness.[82] The Prosecution therefore bears the burden of proof on the issue of notice and any prejudice to the Accused.

41. The Indictment generally alleges that Bagosora, as *directeur de cabinet*, was a prominent military and political leader and that he conspired with other high-ranking officials and civilians to eliminate the Tutsi population and any members of the opposition.[83] As part of this plan, he gave speeches and incited crowds to take up arms against the enemy.[84] It would have been impracticable to plead each instance in which the Accused addressed a crowd. Moreover, the statement attributed to the Accused is not, in and of itself, highly incriminating to the Accused.[85] Consequently, the evidence is admissible.

(l) Witness KJ

42. The Defence requests the exclusion of two portions of Prosecution Witness KJ's testimony.[86] First, it seeks to strike his testimony about a telegram dated 7 or 8 April 1994 that the witness saw on a bulletin board at the camp where he was staying.[87] The telegram, written on behalf of the Ministry of Defence, instructed all soldiers and civilians to arrest Belgians and take them to the nearest military or *gendarmerie* camp.[88] Second, Witness KJ testified that he saw Bagosora spit in the face of a certain Major Jabo, accusing him of protecting Tutsis in Kibuye.[89] The Defence made no objection at the time the impugned evidence was introduced and has failed to set forth any justification for not raising the issue until the present motion, more than two years after the witness testified. As such, the Defence bears the burden of proof.

43. The Indictment does not expressly refer to these incidents, although it makes general allegations concerning an anti-Belgian campaign aimed at forcing the Belgian UNAMIR contingency to withdraw from Rwanda.[90] The Accused is not directly referenced in connection with this campaign but his co-conspirators are. Moreover, according to the Indictment, on the morning of 7 April 1994 at the time when the Belgian soldiers were attacked and beaten by Rwandan soldiers at Camp Kigali:

> 6.24 **Colonel Théoneste Bagosora** and Augustin Ndindiliyimana were about 100 metres away, participating in a meeting at the staff college (Ecole Supérieure Militaire). They were informed by the Camp Commander, Lt. Nubaha, that the Belgian UNAMIR soldiers were under risk of death at Kigali military camp. Other officers, including François-Xavier

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[81] T. 3 November 2003 pp. 30-31. The witness testified on 3 and 4 November 2003.
[82] T. 3 November 2003 pp. 12-13, 25-26.
[83] Indictment, paras. 4.2, 5.1.
[84] *See, e.g.,* Indictment, paras. 5.4-5.15.
[85] *Id.*, para. 5.1.
[86] Motion, Annex A, p. 8 (entry nos. 23-24). The witness testified on 19, 20, 21, 22, and 27 April 2004.
[87] T. 19 April 2004 pp. 55-56.
[88] The witness could not recall whether it was signed by the Accused but stated that generally "such telegrams were signed by the director of cabinet of the ministry of defence, Colonel Bagosora, Théoneste". T. 19 April 2004 p. 55.
[89] T. 19 April 2004 p. 13.
[90] *See, e.g.,* Indictment, paras. 6.9, 6.10, 6.17, 6.18, 6.19, 6.20, 6.21, 6.22, 6.23, 6.26.

Nzuwonemeye, joined the meeting after leaving Kigali military camp while the assaults against the Belgian soldiers were still being perpetrated and four of them were already dead.

6.25 Informed of the danger faced by the Belgian soldiers at Kigali military camp, **Théoneste Bagosora** and Augustin Ndindiliyimana did not take any decision and carried on with the meeting until around 12:00 noon.

44. In the Chamber's view, these allegations put the Defence on notice that the Accused's involvement in or, at the very least knowledge of, the deaths of the Belgian soldiers would be an issue in the case. Consequently, it was in a position to prepare its defence and the evidence is admissible.

45. The second incident is not a material fact and is not highly incriminating of the Accused. It is proof through which the Prosecution attempts to substantiate its claims against the Accused, either through establishing motive or a continuing pattern of conduct by the Accused. Consequently, the evidence is admissible.

(m) Witness OAB

46. The Defence moves to strike the testimony of Prosecution Witness OAB that the Accused ordered a lieutenant to kill a Tutsi woman named Marie-Louise and attended a meeting with Munyagishari and *Interahamwe* leaders at the *Hôtel Méridien* in Gisenyi approximately one week after the installation of the Interim Government.[91] During the course of the witness' testimony, the Defence drew the attention of the Bench to the fact that the witness provided new evidence but did not make a formal objection.[92] The Defence therefore bears the burden of proof to demonstrate that the Accused was not prejudiced in the preparation of its defence.

47. The Indictment mentions that various meetings involving the Accused took place both before and during the events of 1994.[93] The testimony of Witness OAB concerning the Accused's attendance at a meeting at the *Hôtel Méridien* is offered as proof of material facts in the Indictment, is not highly incriminating to the Accused, and need not be explicitly described in the Indictment. Moreover, the Prosecution Pre-trial Brief contained the summary of Witness OAB, who would purportedly testify that a wave of new killings occurred in Gisenyi after the transitional government relocated to Gisenyi and that "he drove Munyagishari several times to and from meetings with Col. Bagosora".[94] Consequently, the evidence is admissible.

48. However, the allegation that Bagosora ordered the killing of a Tutsi woman named Marie-Louise is not contained in the Indictment, the Supporting Material, or the Prosecution Pre-trial Brief. Because it is a highly incriminating allegation of criminal conduct by the Accused, the information needed to be contained in the Indictment or disclosed in a timely and concise manner. The Prosecution failed to do so, thereby preventing the Defence from having notice of the allegation and preparing a proper defence. Consequently, the evidence is excluded.

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[91] *Motion*, Annex A, p. 9 (entry nos. 26-27). *See also* T. 24 June 2003 pp. 50, 65-66.
[92] T. 24 June 2003 p. 53. (Constant: "I must say that 80 percent of what the witness is saying is completely new to us. So I am rather, lost. I don't think it is the fault of my learned colleague ... It is not an objection per se, just a request for some help."
[93] *See, e.g.*, Indictment, paras. 6.3, 6.4, 6.7, 6.8, 6.13, 6.14, 6.24, 6.29, and 6.69.
[94] Prosecution Pre-trial Brief, Appendix A, pp. 105-106.

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(n) Witness XAQ

49. The Defence challenges Prosecution Witness XAQ's testimony that, approximately one week after the Presidential plane crash, he saw the Accused at a place called Nonko speaking to over fifty *Interahamwe* and telling them "to be courageous in their work".[95] While the Defence objected to other parts of the witness' testimony, the Chamber finds no objection on the basis of notice as to this portion of his testimony.

50. The Indictment repeatedly refers to the Accused's incitement of ethnic hatred through speeches to militiamen and others.[96] Additional details of such speeches can be found in the pre-trial summary of purported testimony for Witness XAQ, which provided that "a week after the death of the president, witness heard Colonel Bagosora discussing with about 50 interahamwe".[97] Consequently, any defect in the Indictment was remedied and the Accused was placed on notice of this allegation. The evidence is therefore admissible.

(o) Witness XBG

51. The Defence seeks to exclude testimony by Prosecution Witness XBG that, prior to the massacres at Mudende University, the Accused and another prominent figure had told the *bourgmestre* and Hassan Ngeze to "get rid of all dirt" – referring to Tutsis.[98] The Defence made no objection to this testimony until the present motion, which the Chamber finds to be untimely. Thus, the Defence bears the burden of proof to demonstrate that it did not have notice of this allegation and was hindered in the preparation of its case.

52. No mention of the massacres at Mudende University is made in the Indictment, the Supporting Material, or the Pre-trial Brief. However, the Prosecution motion for leave to add Witness XBG to the witness list makes specific reference to his expected testimony concerning the Accused:

> XBG has, *inter alia*, first-hand information concerning the specific acts of the accused Bagosora and Nsengiyumva that goes directly to incitement of genocide, distribution of weapons to the militia, the *Interahamwe* and *Impuzumugambi*, the existence of a conspiracy to commit genocide, and the actual execution of genocidal massacres in Gisenyi *Prefecture*, Mudende University and Busasamana Parish, in May 1994.[99]

53. As the Chamber stated in a previous decision on the exclusion of evidence for the Nsengiyumva Defence, the motion to add Witness XBG and other witnesses "provided clear and unequivocal notice" of the Prosecution's intent to rely on these material facts as proof of allegations in the Indictment.[100] Consequently, the evidence is admissible.

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[95] Motion, Annex A, p. 9 (entry no. 29). *See also* T. 23 February 2004 pp. 26-27. The witness testified from 23 to 24 February 2004.
[96] *See, e.g.* Indictment, paras. 5.1, 5.4, 5.8, 5.10.
[97] Prosecution Pre-trial Brief, Appendix A, p. 143.
[98] Motion, Annex A, p. 10 (entry no. 30). *See also* T. 8 July 2003 p. 50. The witness testified on 8 and 9 July 2003.
[99] *Bagosora et al.*, 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 13 June 2003, para. 7.
[100] *Bagosora et al.*, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 14.

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(p) Witness XBH

54. The Defence requests the exclusion of Prosecution Witness XBH's testimony concerning two meetings attended by the Accused in Butare: one in February 1994, where the group established a list of 100 persons to be killed; and another in March 1994, where Bagosora obtained a report about Tutsis arrested in Butare and transported to Gisenyi to be killed.[101] Prior to the witness' appearance before the Tribunal, the Defence teams collectively filed a "Notice of Intended Objection" to certain portions of Witness XBH's testimony.[102] The Chamber denied the objection in a written decision of 3 July 2003, which will be elaborated upon below.

55. Paragraph 5.1 of the Indictment alleges that between 1990 and 1994, Bagosora conspired with Nsengiyumva and others to plan the extermination of Tutsis, a plan which included "the preparation of lists of people to be eliminated". Further specificity was provided when the Prosecution moved to add Witness XBH to its witness list in June 2003, at which time it described his testimony as follows:

> XBH has, *inter alia*, eye-witness accounts of Bagosora's and Nsengiyumva's conspiring to commit genocide in Butare in February 1994 in that they met with others and drew up a list of around 100 Tutsis to be killed and that the list was subsequently copied and distributed to the military and civilian authorities in Gisenyi *Prefecture*. The witness further has first-hand information relating to subsequent killings, pursuant to that list, in Gisenyi *Prefecture*, in or around the second week of April 1994.[103]

56. The motion clearly established that the allegations of Witness XBH would form part of the Prosecution case, and the Chamber allowed the witness' testimony. Denying the Defence objection to the testimony of Witness XBH, the Chamber noted:

> [T]he Defence has known for seven months of the contents of Witness XBH's testimony. This does not mean to say that no prejudice has been caused to the Defence by the addition of these witnesses after commencement of the trial. Nevertheless, the Chamber considers the notice to be sufficient to permit admission of the testimony, but subject to a latitude to the Defence to introduce evidence at a later stage that may impeach the witness's testimony, or to recall witnesses whose cross-examination might be needed in light of information subsequently discovered.[104]

57. The Chamber notes that the witness was recalled in June 2005, nearly two years after his initial testimony, at which time the Bagosora, Nsengiyumva, and Kabiligi Defence teams conducted further cross-examination.[105] In light of the circumstances, the Chamber finds that the Defence had sufficient notice of the witness' testimony and an ample opportunity to question him on these issues. Consequently, the evidence is admissible.[106]

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[101] Motion, Annex A, pp. 10-11 (entry nos. 31-32). *See also* T. 3 July 2003 pp. 16-21 (1st meeting), 26-27 (2nd meeting). This witness testified from 3 to 7 July 2003 and then again from 20 to 22 June 2005.

[102] *Bagosora et al.*, Defence Notice of Intended Objection to Elements of Testimony of Witness XBH, filed on 30 June 2003.

[103] 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 13 June 2003 para. 8.

[104] *Bagosora et al.*, Decision on Defence Objection to Elements of Testimony of Witness XBH (TC), 3 July 2003, para. 14.

[105] The witness testified under the pseudonym of PB-1 during his recall testimony from 20 to 22 June 2005.

[106] The Chamber's ruling is consistent with its decision on the Nsengiyumva motion for exclusion of evidence. *See Bagosora et al.*, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 11.

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(q) Witness XBM

58. The Defence requests that the Chamber exclude Prosecution Witness XBM's testimony that the Accused: (i) attended an MRND meeting at the Umuganda Stadium in Gisenyi on 27 October 1993, where he made remarks against Tutsis and the Arusha Accords in front of over 4,000 people; (ii) attended an MRND/CDR meeting in Gisenyi in February 1994, where he promised to provide military training for the youth; (iii) organized a celebratory gathering to reward the killers at the *Hôtel Méridien* in Gisenyi on 24 May 1994, where he gave money to Serushago and provided drinks to the attendees; and (iv) attended a meeting at MRND headquarters in Gisenyi at the beginning of June 1994, where he made anti-Tutsi remarks.[107] The Defence made no contemporaneous objection to the witness' testimony on these events, but it had previously contested the addition of Witness XBM to the Prosecution witness list on the grounds that the Prosecution keeps changing its case by adding new witnesses.[108] In the Chamber's view, the Prosecution bears the burden of proof to establish that the Accused had notice of the allegations and suffered no prejudice.

59. The Indictment alleges that Bagosora opposed the negotiation of the Arusha Accords, made public statements and speeches denouncing the Tutsi population and calling for their extermination, participated in meetings to plan the killing of Tutsis and moderate Hutu opponents, and facilitated the training and arming of the *Interahamwe*.[109]

60. Furthermore, as in the case of Witnesses XBG and XBH, the Prosecution motion to add Witness XBM provided additional details of the witness' purported testimony:

> XBM has, *inter alia*, first-hand information with regard to the specific acts of Bagosora and Nsengiyumva that goes directly to anti-Tutsi statements made by Bagosora and Nsengiyumva during public meetings and rallies held in Gisenyi *Prefecture* in 1993 and 1994, as well as to their involvement in the distribution of weapons to the militia and the training of the militia. The witness also has first-hand information concerning Nsengiyumva's and Bagosora's involvement in the conspiracy to commit genocide and the execution of genocidal massacres.[110]

In light of the Chamber's decision to add the witness and to postpone his testimony until later in the trial session, the evidence is admissible.[111]

(r) Witness XXC

61. The Defence moves to exclude the following testimony by Prosecution Witness XXC: (i) Bagosora struck a man named Lando with a gun in October 1990 at the Kigali Stadium; (ii) Bagosora held meetings with Ngirumpatse and the witness' employer at the employer's home in July and August 1993 and March 1994 before proceeding to the Presidential palace; (iii) Bagosora distributed weapons to the *Interahamwe* sometime around 20 April 1994 from his house; and (iv) Bagosora was a member of a death squad consisting

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[107] Motion, Annex A, pp. 11-12 (entry nos. 33-36). *See also* T. 14 July 2003 pp. 17-20 (1st event), 21-24 (2nd event), 24-26 (3rd event), 29-30 (4th event). The witness testified on 14 and 15 July 2003.
[108] T. 24 June 2003 pp. 18-22.
[109] *See, e.g.,* Indictment, paras. 5.1, 5.8, 5.10, 5.11, 5.12, 5.13, 5.17, 5.18, 5.28, 5.29.
[110] 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 13 June 2003 para. 9.
[111] *Bagosora et al.*, Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 *bis* (E), 26 June 2003, para. 18.

of people from Gisenyi.[112] The Defence repeatedly objected during the witness' testimony on the grounds that many of the allegations or portions thereof were entirely new and had not been disclosed to the Defence.[113] The Chamber finds that the Prosecution bears the burden to show that the Accused had notice of the allegations and was not prejudiced in the preparation of his defence.

62. Reference to the first allegation, involving the Accused hitting Lando, cannot be found in the Indictment, the Supporting Material, or the Prosecution Pre-trial Brief. The first time the information was conveyed to the Defence was on 15 September 2003 through the will-say statement for the witness.[114] When new facts arise during trial, as they did here in the course of the Prosecution's preparation of the witness, the Chamber must determine how to deal with the new evidence and whether a fair trial requires amendment of the Indictment, an adjournment, or the exclusion of the evidence.[115] In this case, the evidence was admitted and no measures were taken to alleviate any potential prejudice to the Accused because the allegation is not a material fact and is not highly incriminating of the Accused. As such, the evidence is admissible.

63. In the Chamber's view, the Defence had notice of the next series of allegations concerning meetings with the Accused, Ngirumpatse, and the witness' employer on three occasions in 1993 and 1994. The Indictment makes reference to numerous meetings involving the Accused, but no reference is made to these specific meetings.[116] This defect was subsequently cured, however, through the Prosecution Pre-trial Brief, in which the summary for Witness XXC stated:

> Witness will state that Bagosora, Ngirumpatse, Twagirayesu came often [to] his employers house for meetings, and then they would [go] to the Presidents House.
>
> Witness will state that in December 1993, he heard Bagosora and Ngirumpatse telling his employer that when they reached [the] Presidents house that he should tell him not to sign the Arusha Accords, and that if the Arusha Accords were signed that the Tutsi would eliminate the Hutu in Rwanda.[117]

While the summary does not contain the three dates ultimately testified to by the witness, the Chamber finds that the Defence had notice of the meetings such that it could prepare a defence. Consequently, the evidence is admissible.

64. The Chamber also finds that the Defence had notice of the third allegation concerning the distribution of weapons by the Accused at his residence. Paragraphs 5.1, 5.18, 5.26, 5.28, 5.29, and 5.30 of the Indictment all refer to the distribution of weapons, with paragraph 5.28 directly alleging that the Accused and others "distributed weapons to the militiamen and certain carefully selected members of the civilian population with the intent to exterminate the Tutsi population and eliminate its 'accomplices'" before and during the events of April

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[112] Motion, Annex A, pp. 13-14 (entry nos. 37-42). The witness testified on 17, 18, and 19 September 2003. *See also* T. 18 September 2003 p. 12 (1st incident); T. 18 September 2003 pp. 14-21; T. 17 September 2003 pp. 35-37 (2nd incident); T. 17 September 2003 p. 20 (3rd incident); T. 17 September 2003 pp. 24-25 (4th incident).

[113] *See, e.g.*, T. 17 September 2003 pp. 2-5; T. 18 September 2003 pp. 3-6, 18-19, 23-25.

[114] *Bagosora et al.*, Memorandum from the Prosecution to the Defence Teams re: Notification of Anticipated Evidence of Witness XXC, etc., filed on 15 September 2003, para. 2 (c). The Prosecution also sent this memorandum to the parties by email on 12 September 2003.

[115] *Bagosora et al.*, Appeals Chamber Decision, para. 35.

[116] *See, e.g.*, Indictment, paras. 6.3, 6.4, 6.7, 6.8, 6.13, 6.14, 6.24, 6.29, and 6.69.

[117] Prosecution Pre-trial Brief, Appendix A, p. 148.

1994. It would have been impracticable for the Prosecution to plead each instance in which the Accused was involved in the distribution of weapons. Consequently, the evidence is admissible.

65. In addition, the Defence had reasonable notice of the Accused's alleged participation in death squads. The Chamber has previously had the occasion to rule on this matter in connection with the original Ntabakuze exclusion decision, wherein it found:

> The Indictment makes no mention of these groups by name, but paragraphs 1.13 to 1.16 do refer to "prominent civilian and military figures", sharing an "extremist Hutu ideology", working together from as early as 1990 to pursue a "strategy of ethnic division and incitement to violence". Their strategy included "the preparation of lists of people to be eliminated" and "the assassination of certain political opponents". The Indictment was accompanied by a document entitled "Supporting Materials" which consists of specific and focused excerpts from statements of prospective witnesses in relation to each paragraph of the Indictment. This document does not constitute a massive disclosure and would have provided the Defence with a clear indication of the material facts which it would present in relation to each paragraph of the Indictment. In relation to paragraph 1.12, an expert witness is quoted as saying that "one notes in particular [within the armed forces] the creation of the AMASASU in January 1993 which demanded the establishment of a cleansed army and the elimination of all RPF allies)".[118]

Despite the Prosecution's failure to expressly use the words "death squads" or "AMASASU," it provided timely notice in the Indictment and in subsequent disclosures of its intent to prove that the Accused participated in a network of groups aimed at killing Tutsis.[119] Consequently, the evidence is admissible.

(s) Witness XXY

66. The Defence requests the exclusion of Prosecution Witness XXY's testimony that: (i) the Accused made a speech in November 1993 inciting people to exterminate Tutsis, which the witness heard on tape; (ii) the Accused moved around the country in a Mercedes Benz military jeep from mid-May until the fall of Gitarama giving orders to soldiers; and (iii) in mid-June, the Accused told Hutu refugees at Bulinga that their plight was caused by Tutsis and that it was necessary to kill all Tutsis, even the babies.[120] The Defence made no prior objection the witness' testimony and has offered no justification for failing to do so. Consequently, the Defence bears the burden of proof.

67. The Indictment made general allegations that the Accused gave speeches inciting the population to exterminate the Tutsi population and any members of the opposition.[121] As the Chamber has previously stated, it would have been impracticable to specify each individual address given by the Accused. Even if the Chamber were to find the Indictment defective for

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[118] *Bagosora et al.*, Ntabakuze Trial Chamber Decision, para. 13 (citing Supporting Material p. 13 (report of André Guichaoua)). *See also Bagosora et al.*, Decision on Kabiligi Motion for Exclusion of Evidence (TC), 4 September 2006, paras. 14-16; *Bagosora et al.*, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 15 September 2006, para. 34.

[119] Prosecution Pre-trial Brief, Appendix A, pp. 81 (Witness GS "will state that Bagosora, Ntabakuze, Ntibihora and Mutabera were part of the death squad that supervised the Interahamwe and provided them with grenades. The death squad targeted mainly Tutsis"); 143 (Witness XAQ "stressed that the killing started before the death of the president, with soldiers members of death squads, sent to kill designated people in Kigali").

[120] Motion, Annex A, pp. 15-16 (entry nos. 43-46). *See also* T. 11 June 2004 pp. 9-10 (1st event), 17 (2nd event), 17-18 (3rd event). The witness testified on 10, 11, and 30 June 2004 and on 1 July 2004.

[121] *See, e.g.*, Indictment, paras. 5.1, 5.4, 5.8, 5.10, 5.12, 5.13.

failing to mention this speech, the Prosecution remedied the situation and provided notice to the Defence in its Pre-trial Brief, wherein Witness XXY's summary states that he "listened to an audiotape at Prefect Renzaho's house, with the voices of the Prefect, Ferdinand Nahimana, Minister Augustin Bizimana, Colonel Bagosora, President Habyarimana ... [and] heard the voice of Bagosora who stressed in substance the need to exterminate the Tutsi as a way to bring peace to the country".[122] The testimony concerning the Accused's speech in November 1993 is therefore admissible.

68. The second allegation that the Accused was seen driving in a Mercedes Benz military jeep giving orders to soldiers from mid-May until the fall of Gitarama is also admissible. The Indictment alleges that the Accused took over power in the absence of the Minister of Defence and that he made speeches inciting violence, distributed weapons to be used to kill Tutsis, and gave orders to soldiers and militiamen.[123] The testimony of Witness XXY is generalized and fits into the Prosecution theory of the case as articulated in the Indictment.

69. The Chamber finds that the Defence had sufficient notice of the final allegation such that it may also be admitted. As discussed previously, the Indictment contains general allegations that the Accused made speeches inciting violence against the Tutsis, which the Chamber deems sufficient given the large volume of addresses made by the Accused in 1994.[124] Consequently, the evidence is admissible.

(t) Witness ZF

70. The Defence requests the Chamber to exclude Prosecution Witness ZF's testimony that the Accused: (i) attended a meeting at Butotori Camp in 1992 with Mugesera; (ii) attended a meeting with Nsengiyumva, Ntabakuze and others on an unknown date, during which time he warned of a plan by the Tutsi to exterminate the Hutu; and (iii) telephoned Nsengiyumva on 7 April 1994 at 6.00 a.m. and instructed him to arrest a particular Tutsi civil servant.[125]

71. Prior to Witness ZF's testimony, the Defence filed a motion seeking to defer or exclude his testimony on the grounds that the Prosecution failed to disclose certain information, including the witness' identity, thirty-five days before his appearance in accordance with a prior order by the Chamber.[126] The Chamber found that the Prosecution was in violation of its disclosure requirements and ordered immediate disclosure of the information.[127] The Bagosora Defence again raised the issue of notice immediately before the testimony of Witness ZF and was joined by the other Defence teams, but the Chamber allowed the examination of the witness to proceed with the caveat that the Defence might be allowed additional time at a later stage to deal with any new issues that might arise during the witness' testimony.[128] In these circumstances, the Chamber finds the burden of proof to be on

[122] Prosecution Pre-trial Brief, Appendix A, p. 152.
[123] *See, e.g.,* Indictment, paras. 4.2, 4.4, 5.1, 5.4, 5.8, 5.12, 5.13, 5.26, 5.28, 5.29, 6.2, 6.27, 6.32, 6.34, 6.43,
[124] *Id.,* paras. 5.4, 5.8, 5.10, 5.12, 5.13.
[125] Motion, Annex A, p. 16 (entry nos. 47-48). *See also* T. 27 November 2002 pp. 70-76; T. 28 November 2002 pp. 43-47. The witness testified from 26 to 28 November 2002 and from 2 to 5 December 2002.
[126] *Bagosora et al.,* Motion to Defer or Exclude the Testimonies of Ruggiu, XAM and ZF, filed on 2 October 2002, paras. 40-44.
[127] *Bagosora et al.,* Decision on the Defence for Bagosora's Motion for Postponement or Quashing of the Testimonies of Witnesses Ruggiu, XAM, and ZF (TC), 30 September 2002, para. 16.
[128] T. 26 November 2002 pp. 61-85.

the Prosecution in terms of showing that the Defence had notice of the impugned allegations and that it was not prejudiced in the preparation of its defence.

72. As discussed previously in connection with several Prosecution witnesses, the Indictment makes reference to numerous meetings involving the Accused.[129] Paragraph 5.11 of the Indictment suggests that the Accused attended meetings prior to the events of 1994 in order to discuss his disapproval of the Arusha Accords. Due to the large scale of events and the frequency with which such meetings occurred, it would have been impracticable to require the Prosecution to plead all of these meetings. Moreover, reference is repeatedly made in the Indictment to the Accused's belief that the only solution was to exterminate the Tutsis in order to eliminate any threat that they might attack the Hutu population.[130] Consequently, Witness ZF's testimony about these two meetings is admissible.

73. However, the Chamber views the allegation that the Accused telephoned Nsengiyumva on the morning of 7 April 1994 in a different manner. While the Indictment contains general allegations that killings were perpetrated on the basis of lists prepared on the Accused's orders and that the Accused identified certain persons as enemy Tutsis and their sympathizers to be killed, there is no specific mention of this allegation in the Indictment.[131] The testimony describes incriminating personal conduct by the Accused: Bagosora ordered Nsengiyumva to arrest a man named Kabiligi who worked for the Great Lakes Community. Concise notice of this material fact should have been given to the Accused in the Indictment; or alternatively, the defect should have been cured through subsequent, timely notice. Since no such notice was provided, the evidence is excluded.

(iii) Cumulative Effect of Cured Defects

74. Neither party made submissions on the issue of whether defects in the Indictment, even if cured, prejudiced the Accused's right to a fair trial. The Chamber must nonetheless assess the totality of cured defects in the Indictment and their cumulative effect on the Accused's ability to prepare his defence. The Appeals Chamber has provided the following guidance to the Trial Chamber:

> [W]hen the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial 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 prejudice an accused's right to a fair trial by hindering the preparation of a proper defence.[132]

[129] *See, e.g.*, Indictment, paras. 6.3, 6.4, 6.7, 6.8, 6.13, 6.14, 6.24, 6.29, 6.69.
[130] *Id.*, paras. 5.1, 5.8, 5.10, 5.12, 5.13.
[131] *Id.*, paras. 5.1, 5.8, 5.36, 5.37, 6.27, 6.30, 6.32, 6.34.
[132] *Bagosora et al.*, Appeals Chamber Decision, para. 26.

75. The Chamber has issued two recent decisions addressing this question and has concluded that fairness is the determinant factor.[133] As set forth in those decisions, the Chamber must decide whether the Accused was in a position to know and understand the allegations against him such that he could prepare a proper defence. It must look to whether a large number of material facts were not pleaded in the Indictment and whether these defects, even if subsequently cured, prejudiced the Accused's right to a fair trial.[134]

76. In most instances where the Defence asserts that allegations are outside the scope of the Indictment, notice was provided through the Indictment, the Supporting Material, and the Prosecution Pre-trial Brief. The Prosecution filed the Supporting Material on 3 August 1998, the Amended Indictment on 13 August 1999, and the Prosecution Pre-trial Brief on 21 January 2002. The Chamber finds that any curing of defects in the Indictment through notice of new material facts which occurred prior to the commencement of trial was sufficient to inform the Accused of the allegations against him such that he could prepare a proper defence. Trial proceedings began on 2 April 2002 but were suspended until September 2002. Although thirty-two trial days were held in 2002, the trial did not build real momentum until proceedings resumed before Trial Chamber I in June 2003. The Prosecution closed its case on 14 October 2004, and the Bagosora Defence commenced its case on 11 April 2005. On the basis of this information, any new material facts conveyed to the Defence through the three aforementioned documents occurred almost three and a half years before the Defence even began the presentation of its case.

77. In four other instances, the Chamber found that defects were cured by notice during trial through motions to add witnesses to the Prosecution witness list.[135] Notice was deemed adequate in one additional instance where the Chamber granted a two week adjournment for the Defence to prepare its cross-examination of the witness.[136] Finally, in two instances, the Chamber found the impugned evidence to be proof in support of allegations contained in the Indictment and not actually new material facts; therefore no curing of the Indictment was necessary.[137]

78. Consequently, the Chamber finds that the number of alleged deficiencies in the Indictment and the timing and means by which they were cured – most often well in advance of trial and years before the Defence presented its case – did not render the trial unfair and did not materially prejudice the Accused. The Chamber recalls that the admission of evidence is not to be confused with the consideration of its ultimate weight.[138]

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[133] *Bagosora et al.*, Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision (TC), 17 April 2007, para. 29; *Bagosora et al.*, Decision Reconsidering Exclusion of Evidence Related to Accused Kabiligi (TC), 23 April 2007, para. 39.

[134] *Bagosora et al.*, Appeals Chamber Decision, paras. 26, 30.

[135] *See, supra*, paras. 13-17 (Witness ABQ), 51-53 (Witness XBG), 54-57 (Witness XBH), 58-60 (Witness XBM).

[136] *See, supra*, paras. 23-25 (Witness DA).

[137] *See, supra*, paras. 42-45 (Witness KJ), 46-48 (Witness OAB).

[138] *Nyiramasuhuko*, Decision on Pauline Nyiramasuhoko's Appeal on the Admissibility of Evidence (AC), 4 October 2004, paras. 6-7. *See also Bagosora et al.*, Decision on Ntabakuze Motions to Admit Documents Under Rule 92 *bis* (TC), 12 April 2007, para. 9; *Bagosora et al.*, Decision on Bagosora Motion to Exclude Photocopies of Agenda (TC), 11 April 2007, para. 6.

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FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the motion in part;

DECLARES the following pieces of evidence inadmissible:

1. Witness DCH's testimony that, while attending a meeting at the *Hôtel des Mille Collines* in June 1994, the Accused gave instructions to take a group of Tutsis away to be killed;

2. Witness OAB's testimony that the Accused ordered a lieutenant to kill a Tutsi woman named Marie-Louise; and

3. Witness ZF's testimony that the Accused telephoned Nsengiyumva on 7 April 1994 at 6.00 a.m. and instructed him to arrest a particular Tutsi civil servant.

Arusha, 11 May 2007

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]