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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Inés Mónica Weinberg de Roca, Presiding
Florence Rita Arrey
Robert Fremr
Registrar: Adama Dieng
Date: 26 June 2007

JUDICIAL OFFICE OF THE
PROSECUTOR
2007 JUN 26 A 10:47
[Signature]

THE PROSECUTOR

v.

Simon BIKINDI

Case No. ICTR-2001-72-T

**DECISION ON THE DEFENCE *REQUÊTE EN EXCLUSION DES ÉLÉMENTS DE
PREUVE PRODUITS PAR L'ACCUSATION POUR ETABLIR DES FAITS NON
CONTENUS DANS L'ACTE D'ACCUSATION***

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INTRODUCTION

1. The Defence Motion requests the Chamber to exclude certain evidence led by the Prosecution on the basis that the evidence refers to allegations not included in the Indictment.¹ The Defence submits that the Prosecution should not be allowed to cure the Indictment by presenting evidence about several locations and alleged events to which there is no reference in the Indictment,² -- specifically, with respect to the alleged murders of Karasira and members of his family,³ and Gasasira⁴, as well as to various alleged meetings held in Ngororero,⁵ Kabaya⁶ and Butare.⁷
2. The Prosecution Response opposes the request for exclusion.⁸ The Prosecution submits that the Defence did not raise an objection to the evidence in a timely manner and did not provide any reasonable explanation for its tardiness. According to the Prosecution, the Defence must demonstrate that it has suffered prejudice as a result of the alleged lack of notice for the evidence in question.⁹ The Prosecution submits that it served the Defence with witness statements prior to the commencement of the trial, which constituted adequate notice of the evidence.¹⁰ The Prosecution also submits that the Accused is not charged with attending meetings at Ngororero, Kabaya and Butare but rather with inciting hatred and killing of Tutsi through his music and utterances.¹¹
3. In its Reply,¹² the Defence argues that the Indictment must contain all material facts in relation to the charges against the Accused.¹³ The Defence submits that its failure to object earlier to the Prosecution evidence in question does not preclude an objection at this stage of the proceedings.¹⁴

¹ *Requête en exclusion des éléments de preuve produits par l'Accusation pour établir des faits non contenus dans l'Acte d'accusation*, filed on 25 April 2007 (the "Motion"), paras. 1, 24.

² Motion, para. 42: « Dans le cas d'espèce, le requérant soumet qu'il y a beaucoup de lieux, de secteurs, de communes et de préfectures qui n'ont pas été mentionnés dans l'acte d'accusation mais où les témoins à charge ont cru devoir déposer (sic) que le requérant s'y était trouvé à un moment donné soit pour y commettre des crimes soit pour y participer à des meetings politiques. »

³ Motion, paras. 53-67.

⁴ Motion, paras. 68-79.

⁵ Motion, paras. 80-83.

⁶ Motion, paras. 84-85.

⁷ Motion, paras. 86-89. The Defence further submits concerns that clearly fall beyond the scope of its Motion, such as an illegal seizure of documents belonging to the Accused, a delay in the commencement of the trial that is the sole fault of the Prosecution, and that the Indictment uses a unique fact to establish multiple crimes. Motion, paras. 4-11, 13-14, 23.

⁸ *The Prosecutor's Response to the Defence Motion for Exclusion of Evidence*, filed on 30 April 2007 (the "Response").

⁹ Response, paras. 15-16.

¹⁰ Response, paras. 17, 19-28.

¹¹ Response, para. 6.

¹² *Réplique à la réponse du Procureur à la requête aux fins d'exclusion des éléments de preuves produits par le Procureur et qui ne sont pas contenus dans l'Acte d'Accusation*, filed on 8 May 2007 (the "Reply").

¹³ Reply, para. 14: « Immutabilité de l'acte d'accusation ».

¹⁴ Reply, paras. 44-45.

DELIBERATIONS

(i) *Applicable Principles*

4. Rule 89(C) of the Rules of Procedure and Evidence (the "Rules") provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". However, this rule is limited by Article 20 of the ICTR Statute, which sets out the Trial Chamber's obligation to ensure that an accused has proper notice of the case against him or her. In *Kupreškić*, the Appeals Chamber interpreted Article 20 of the similar ICTY Statute to place an obligation on 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".¹⁵
5. Thus the appropriate enquiry is whether the indictment establishes the material facts of the Prosecution case in sufficient detail to clearly inform the accused of the charges against him or her to enable the accused to prepare a defence. Allegations of physical perpetration of a criminal act by an accused must be present in the indictment. The form of criminal responsibility under which an accused is charged must also be explicitly set forth in the indictment and [t]he "material facts which concern the personal actions of the accused have to be clearly and specifically pleaded in the indictment".¹⁶
6. The Appeals Chamber has determined that the materiality of a particular fact and the specificity required in pleading depend on the nature of the Prosecution case:

Whether particular facts are "material" 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 of the charges in question.¹⁷

7. While the omission of a count or a charge from the indictment may not be cured without an amendment of the Indictment,¹⁸ the omission of a material fact underpinning a charge in the Indictment may be cured if the Prosecution subsequently provides the accused with "timely, clear and consistent information detailing the factual basis underpinning the

¹⁵ *Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 88. See also *Furundžija*, Judgement (AC), 21 July 2000, para. 147.

¹⁶ *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; See *Kupreškić et al.* Judgement (AC), para. 89; *Krnjelac* Judgement (AC), para. 132; *Niyitegeka* Judgement (AC), para. 193; *Ntakirutimana* Judgement (AC), para. 32; *Kvočka et al.* Judgement (AC), para. 28; *Nalečić & Martinović* Judgement (AC), para. 24; *Cyangugu* Judgement (AC), para. 23; *Gacumbitsi v. The Prosecutor*, Judgement (AC), 7 July 2006, para. 49.

¹⁷ *Nalečić & Martinović*, Judgement (AC), 3 May 2006, para. 24 (footnotes omitted).

¹⁸ *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. 29; *Bagosora et al.*, Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 11 May 2007, para. 6.

- charges against him or her".¹⁹ The Appeals Chamber has emphasized that an indictment shall be cured only in a limited number of cases.²⁰ The Appeals Chamber has also indicated that no distinction shall be made between cases where the Prosecution knew of the material facts at the time the indictment was filed and simply failed to plead them and cases where the material facts subsequently came to the knowledge of the Prosecution. In both instances, the risk of prejudice for the accused is the same.²¹
8. The Prosecution Pre-trial Brief, read together with its annexure (including the summary of expected witness testimonies, filed pursuant to Rule 73bis (B)(iv)(a) and (b) of the Rules), the Prosecution opening statement, or a motion to add witnesses are adequate sources for notice.²² However, the disclosure of witness statements is not sufficient in itself to provide notice to an accused to prepare his or her case.²³
 9. In *Bagosora et al.*, the Trial Chamber recalled that objections play an "important role in ensuring that the trial is conducted on the basis of evidence which is relevant to the charges against an accused".²⁴ The Appeals Chamber has indicated that objections based on lack of notice should be specific and timely and should be raised when evidence of a new material fact is introduced.²⁵ When an objection based on lack of notice is raised at trial but after the evidence has been adduced, the Trial Chamber should determine if the objection is so untimely as to shift the burden of proof to the Defence to demonstrate any prejudice suffered by the accused in his or her ability to prepare the case. The Trial Chamber must also consider whether the Defence provided a reasonable explanation for its failure to raise a contemporaneous objection and whether the Defence has demonstrated that the objection was raised as soon as possible thereafter.²⁶

(ii) Application: Specific Exclusion Requests

Alleged Murders of Karasira and Eight Members of His Family

10. The Defence objects to the testimonies of Prosecution Witnesses DKW and AHP that the Accused ordered and participated in the murders of Karasira and eight members of his family at the *Commune Rouge*.²⁷ The Chamber observes that the Indictment does not

¹⁹ *Kupreškić et al.*, Judgement (AC), 23 October 2001, para. 114. See *Naletilić and Martinović*, Judgement (AC), 3 May 2006, para. 26.

²⁰ *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.

²¹ *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.

²² *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. For the fact that charts of witnesses including summary of intended testimony should be read together with the Pre-trial brief, see *Ntakirutimana*, Judgement (AC), 13 February 2004, para. 48; *Gacumbizi*, judgement (AC), 7 July 2006, paras. 27-58; *Naletilić and Martinović*, Judgement (AC), 3 May 2006, para. 45; *Muhimana*, Judgement (AC), 21 May 2007, para. 82; *Bagosora et al.*, Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 11 May 2007, para. 7.

²³ *Bagosora et al.*, Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 11 May 2007, para. 7.

²⁴ *Bagosora et al.*, Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 11 May 2007, para. 8.

²⁵ *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. 46.

²⁶ *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. 45.

²⁷ Motion, para. 53.

include any explicit reference to this allegation and that neither the body of the Pre-Trial Brief nor the Prosecution Opening Statement includes such an allegation. However, paragraph 47 of the Indictment and paragraph 59 of the Pre-Trial Brief refer to alleged murders of unnamed Tutsi at the *Commune Rouge* and implicates the Accused in these murders.

11. Witness BKW testified from 16 to 19 October 2006, and Witness AHP testified on 19 and 20 October 2006. Both witnesses gave evidence regarding the murders of Karasira and members of his family. The summary of the intended testimony of Prosecution Witness BKW, which was filed on 14 August 2006 pursuant to Rule 73bis (B)(iv)(a) and (b) of the Rules, indicates that the witness was called to testify on allegations of murder. The summary also signals Witness BKW's specific testimony concerning the murder of Karasira and his family. Witness BKW's will-say statement, disclosed to the Defence on 12 October 2006, contains a further clear reference to the murder of Karasira and his family. The Defence itself also notes in its Motion that Witness BKW refers to the murder of Karasira and his family in a written statement to the Prosecution, dated 15 February 2005. This statement, in its unredacted form, was disclosed to the Defence on 11 July 2006. The summary of the intended testimony of the witness, read in conjunction with his written statement to the Prosecution, his will-say statement, the Indictment and the Pre-Trial Brief constitutes timely, clear and consistent information sufficient to put the Accused on notice that he was charged with the murder of Karasira and members of his family.
12. The Chamber notes that the summary of the intended testimony of Prosecution Witness AHP, disclosed on 14 August 2006, does not make reference to the murder of Karasira and his family. However, Witness AHP's written statement, dated 18 and 19 June 2002, does refer to this alleged incident and the surrounding circumstances, but does not mention the name of the alleged victim, "Karasira". This statement was disclosed to the Defence on 28 September 2005 in redacted form and in unredacted form on 11 July 2006. The Chamber notes that Witness AHP's written statement was disclosed to the Defence, in redacted form more than 13 months and in unredacted form more than three months, before the witness' testimony. In the Chamber's view, the length of time between Witness AHP's testimony, on 19 and 20 October 2006, and the prior disclosure of the witness' written statement placed the Defence on notice that the alleged incident mentioned in the statement could be elicited during the witness' testimony.
13. The Defence did not raise an objection for lack of notice during the testimonies of Witnesses BKW or AHP concerning the alleged murders. In fact the transcript shows that the Defence extensively cross-examined Witness BKW on the alleged incident involving Karasira and his family. The Chamber notes that the Defence has not provided a reasonable explanation for its failure to raise a contemporaneous objection about the disputed evidence and that the burden of proof therefore has shifted to the Defence to demonstrate any prejudice suffered in its ability to prepare its case. The Defence has failed to meet its burden. Consequently, the testimonies of Witness BKW and AHP on this allegation are admissible.
14. The Chamber further observes, in respect to credibility issues raised by the Defence, that the appropriate stage of the proceedings to make a credibility assessment is at the end of trial, in light of the totality of the evidence.

Alleged Murder of Gasasira

15. The Defence also objects to the testimony of Witness AHP concerning the murder of Gasasira. The Chamber notes that neither the Indictment nor the body of the Pre-Trial Brief nor the Prosecution Opening Statement makes reference to the murder of a person named Gasasira. However, the Indictment, in paragraph 47, and the Pre-Trial Brief, in paragraph 59, refer to the murders of unnamed Tutsi and implicates the Accused in murders committed at the *Commune Rouge*. Paragraph 21 of the Indictment also alleges that the Accused participated, instigated and incited violence against Tutsi and moderate Hutu, resulting in numerous deaths.
16. Witness AHP testified regarding the alleged murder of Gasasira. The Defence raised no objection to this evidence and cross-examined the witness on his testimony about this incident.
17. The Chamber notes that the summary of the intended testimony of Prosecution Witness AHP, filed pursuant to Rule 73bis (B)(iv)(a) and (b) of the Rules, was disclosed to the Defence on 14 August 2006. The summary clearly refers to the Accused's participation in the murder of Gasasira, director of the national printing company, at the *Commune Rouge*. The summary also indicates the witness' testimony concerning allegations in support of paragraph 21 of the Indictment. The Chamber further observes that Witness AHP's written statement, dated 18 and 19 June 2002, refers to the murder of Gasasira. This statement was disclosed to the Defence on 28 September 2005 in redacted form and in unredacted form on 11 July 2006.
18. The Chamber finds that the above prior disclosure read together constitutes timely, clear and consistent information sufficient to place the Accused on notice that he was charged with the murder of Gasasira.
19. The Defence has not provided a reasonable explanation for its failure to raise an objection during or very near to the testimony of Prosecution Witness AHP about the Accused's alleged participation in the murder of one Gasasira. Failure to do so shifts the burden of proof to the Defence to demonstrate that it lacked notice of these allegations and that it has suffered prejudice in its ability to prepare its case. The Defence has failed to meet its burden. Consequently, the testimony of Witness AHP concerning the murder of Gasasira is admissible.
20. The Defence also raises several other arguments to exclude the evidence concerning the murder of Gasasira: that the witness is not credible; that accused in other proceedings have already been charged by the Prosecution with this crime; and that the victim has not been correctly identified by the Prosecution. The Chamber will address these issues at the end of the proceedings in its assessment of the totality of the evidence.

Alleged Meeting in Ngororero

21. The Defence objects to the testimony of Prosecution Witness BHB, on 20 September 2006, that the Accused sang at a rally in Ngororero in 1993, on the basis that the alleged incident was not mentioned in paragraphs 12 and 13 of the Indictment. The Prosecution argues that the Defence received adequate notice of Witness BHB's testimony, which relates, not to paragraphs 12 and 13, but to paragraphs 20 and 33 of the Indictment concerning the alleged incitement by the Accused to kill Tutsi. The Prosecution submits that the specific location of the meetings is not in issue insofar as the

Accused has not been charged "with the crime of attending meetings. He is accused of inciting hatred and killing of Tutsi through his music and utterances."²⁸

22. Witness BHB's written statements, dated 17 August 2000 and 15 April 2001, respectively, were disclosed in unredacted form, on 11 July 2006, to the Defence. Both statements mention that the Accused was present at a rally in Ngororero, where he allegedly delivered an anti-Tutsi speech. Similarly, the Prosecution summary of Witness BHB's expected testimony, filed on 14 August 2006 pursuant to Rule 73bis (B)(iv)(a) and (b) of the Rules, indicates evidence concerning the Accused's presence at a meeting in Ngororero.
23. According to the Prosecution summary, Witness BHB's intended testimony relates to allegations in paragraphs 20 and 33 of the Indictment – not paragraphs 12 and 13, as asserted by the Defence. However, the Chamber notes that all of these paragraphs fail to identify with any precision the locations related to the allegations therein against the Accused.
24. The Defence has provided no reasonable explanation for its failure to raise an objection during or very close to Witness BHB's testimony about the contested evidence. Nonetheless, in light of the fact that neither the Indictment nor the body of the Pre-Trial Brief nor the Prosecution Opening Statement mentions that the Accused attended a meeting in Ngororero, the Chamber finds that the Defence has not received sufficient notice of this material fact. Accordingly, Witness BHB's evidence concerning the Accused's alleged attendance at a meeting in Ngororero is inadmissible.

Alleged Meeting in Kabaya

25. The Defence seeks to exclude the testimonies of Prosecution Witnesses BKW and BUY concerning the Accused's alleged attendance at a meeting in Kabaya. Witness BKW testified from 16 to 19 October 2006, and Witness BUY testified on 19 February 2007. The Prosecution argues that the Defence received adequate notice of both witnesses' expected testimonies about a meeting in Kabaya attended by the Accused. The Chamber notes that the Defence did not raise contemporaneous objections to the testimonies of either Witness BUY or Witness BKW about their evidence concerning the Kabaya meeting and that the Defence cross-examined both witnesses about the Accused's alleged attendance at the meeting.
26. The Chamber observes that Witness BKW's written statements were disclosed in unredacted form to the Defence on 11 July 2006. Of these, the statement of 22 March 2006 addresses the allegation that several of the Accused's songs conveyed a strong hate message directed at Tutsi and moderate Hutu. Similarly, BKW's written statement, dated 7, 9, 26 February and 1, 2, 3 March 2001, mentions that the Accused's songs conveyed messages of hatred directed at Tutsi and moderate Hutu.
27. The Chamber notes that the Prosecution disclosed a summary of Witness BKW's intended testimony to the Defence on 14 August 2006. Although the summary makes no reference to a meeting in Kabaya, it does indicate the nature of the witness's expected testimony in relation to paragraphs 21 and 48 of the Indictment. Witness BKW's will-say statement, disclosed to the Defence on 16 October 2006, also specifies that the Accused

²⁸ Response, para. 26.

was present and that he performed his music at a meeting in Kabaya. It further states that, following the meeting, many Tutsi were killed.

28. The Chamber notes that the Defence has not provided a reasonable explanation for its failure to raise an objection during or very close to Witness BKW's testimony about the Accused's presence at the Kabaya meeting. However, in light of the fact that neither the Indictment nor the body of the Pre-Trial Brief nor the Prosecution Opening Statement mentions the disputed evidence, the Chamber finds that the Defence has not received sufficient notice to prepare its case. Accordingly, Witness BKW's evidence concerning the Accused's alleged attendance at a meeting in Kabaya is inadmissible.
29. Prosecution Witness BUY was added by the Prosecution, following the Chamber's Decision on 5 February 2007.²⁹ Fourteen days later, on 19 February 2006, Witness BUY testified before the Chamber that the Accused was present and made inciting statements at a meeting in Kabaya. The witness did not present evidence that the Accused performed music at the meeting. The Chamber observes that the witness, in his will-say statement, dated 18 February 2007, mentions a meeting in Kabaya but specifies that the Accused was not present at the meeting. During his testimony, the witness explained that the Prosecution erred in transcribing the notes for the statement which was taken one day before his testimony. The witness confirmed before the Chamber that the Accused was present and made inciting exhortations at the meeting in Kabaya.
30. The Defence has not provided a reasonable explanation for its failure to object during or close to Witness BUY's testimony concerning this alleged incident. However, in light of the fact that neither the Indictment nor the Pre-Trial Brief nor the Prosecution Opening Statement mentions the disputed evidence, the Chamber finds that the Defence has not received sufficient notice to prepare its case. Accordingly, Witness BUY's testimony concerning the Accused's alleged public exhortation at a meeting in Kabaya is inadmissible.

Alleged Meeting in Butare

31. The Defence seeks to exclude the testimonies of Witnesses BKW and BUY concerning the Accused's alleged participation in a meeting in Butare. The Chamber notes that the Defence did not raise an objection during or near the testimony of either witness concerning this alleged incident. The Chamber also observes that arguments raised by the Defence in relation to the credibility of Witness BUY will be addressed when assessing the evidence.
32. The Prosecution argues that the Defence received adequate notice of both witnesses' testimonies about the alleged Butare meeting. The Chamber observes that a summary of Witness BKW's intended testimony was filed on 14 August 2006 pursuant to Rule 73bis (B)(iv)(a) and (b) of the Rules. Although this summary makes no reference to a meeting in Butare, it does indicate evidence in support of allegations, in paragraphs 21 and 48 of the Indictment, that the Accused addressed and animated public gatherings to instigate violence against Tutsi and moderate Hutu. Further mention of the hate message conveyed in the Accused's songs has been provided by: Witness BKW's written statement, dated 22 March 2006; Witness BKW's written statement, dated 7, 9, 26 February and 1, 2, 3

²⁹ Decision on Motion for Protective Measures, Variation of Witness List, and Transfer of Detained Witness BUY, 5 February 2007.

- Marc 2001; and Witness BKW's will-say statements, disclosed on 12 and 16 October 2006. These written statements were all disclosed in unredacted form on 11 July 2006.
33. Similarly, disclosure of Witness BUY's evidence concerning this incident was provided in the form of a written statement, dated 24 October 2006 and disclosed in unredacted form on 21 November 2006 and a will-say statement, disclosed to the Defence on 18 February 2007.
34. The Chamber observes that the Defence has not provided a reasonable explanation for its failure to raise an objection during or very near to the testimonies of Witnesses BKW and BUY concerning the alleged meeting in Butare. However, in light of the fact that neither the Indictment nor the Pre-Trial Brief nor the Prosecution Opening Statement mentions the disputed evidence, the Chamber finds that the Defence has not received sufficient notice to prepare its case. Accordingly, the testimonies of Witnesses BKW and BUY concerning the Accused's alleged presence at a meeting in Butare is inadmissible.

FOR THE ABOVE REASONS, THE CHAMBER

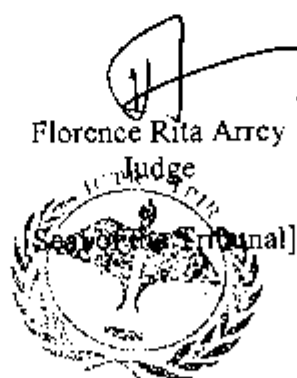
GRANTS the Defence Motion in part;

DECLARES inadmissible the testimony of Witness BHB in relation to the Accused's presence at an alleged meeting in Ngororero and the testimonies of Witnesses BKW and BUY in relation to the Accused's presence at alleged meetings in Kabaya and Butare;

DENIES the Defence Motion in all other respects.

Arusha, 26 June 2007, in English.

Inés Mónica Weinberg de Roca
Presiding Judge



Florence Rita Arrey
Judge

Robert Fremr
Judge