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UNITED NATIONS  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 18 March 2008

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**THE PROSECUTOR**

v.

**Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA**

*Case No. ICTR-98-44-T*

**DECISION ON JOSEPH NZIRORERA'S MOTION TO EXCLUDE EVIDENCE OF MATERIAL FACTS NOT CHARGED IN THE INDICTMENT**

*Article 20 of the Statute; Rules 54 and 73 of the Rules of Procedure and Evidence*

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## INTRODUCTION

1. The Prosecution closed its case on 4 December 2007. Joseph Nzirorera now moves the Chamber, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules"), to exclude from its consideration 47 pieces of evidence elicited from various Prosecution witnesses on the grounds that they constitute material facts, or evidence thereof, that are not pleaded in the Indictment.<sup>1</sup> He places the facts admitted by the Chamber which were not included in the Indictment into three categories: (1) those which of themselves are susceptible of supporting a conviction; (2) those relating to acts and conduct of the Accused; and (3) those relating to the conduct of others for whom the accused are alleged to be responsible. He further submits that in the interests of efficiency, judicial economy, and fairness to all Parties, the close of the Prosecution case is the most appropriate time to reconsider the admission of the evidence in question. The Prosecution opposes the Motion in its entirety.<sup>2</sup>

## DELIBERATIONS

### *Applicable Law*

2. The jurisprudence of this Tribunal has previously enunciated the framework for deciding motions requesting exclusion of evidence on the basis that it falls outside the scope of the indictment. However, in light of the recent Appeals Chamber Judgement in the *Media* case,<sup>3</sup> the Chamber finds it useful to review the general framework. The following is a reproduction of the principles guiding the exclusion of evidence falling outside the scope of the indictment, utilizing principally the jurisprudence of *Bagosora et al.* and *Karemera et al.*, as supplemented by the *Media* Judgement.<sup>4</sup>

<sup>1</sup> Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment, filed 7 January 2008 ("Nzirorera's Motion"). See also Reply Brief: Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment, filed 22 January 2008 ("Nzirorera's Reply").

<sup>2</sup> Prosecutor's Response to Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment, filed 21 January 2008 ("Prosecutor's Response").

<sup>3</sup> *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze c. Le Procureur*, Affaire No. ICTR-99-52-A, (« *Nahimana et consorts* »), Arrêt (AC), 28 novembre 2007 ("Media Judgement").

<sup>4</sup> See *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Case No. ICTR-98-41-T, ("Bagosora et al."), Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment (TC), 11 May 2007 ("Bagosora Decision"), paras. 3-9; *The Prosecutor v. Edouard Karemera, Mathieu Ndirumpatsé, Joseph Nzirorera*, Case No. ICTR-98-44-T, ("Karemera et al.") Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions against the Prosecution and for Exclusion of Evidence Outside the Scope of the Indictment (TC), 19 October 2006 ("Karemera Decision"), paras. 10-20; Media Judgement, paras. 322-327, 406. See also *Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, v. The Prosecutor*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, paras. 88, 114; *André Ntagerura, Emmanuel Bagambiki et Samuel*

3. Rule 89 (C) of the Rules provides that a Chamber may admit any relevant evidence which it deems to have probative value. In order for evidence to be considered relevant, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment. Article 17 (4) of the Statute of the Tribunal ("Statute") and Rule 47 (C) of the Rules require the Prosecution to set forth in the indictment a concise statement of the facts of the case and of the crime(s) with which the suspect is charged. This obligation must be interpreted in light of the rights of the accused to a fair trial, to be informed of the charges against him, and to have adequate time and facilities for the preparation of his defence in accordance with Articles 19, 20 (2), 20 (4) (a) and (b) of the Statute. According to the jurisprudence of the Appeals Chamber, this imposes an obligation upon 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.

4. If the indictment does not set out the material facts of the Prosecution case with sufficient detail or precision so as to clearly inform the accused of the charges against him so that he may prepare his defense, then the Indictment is defective. Determining the materiality of a particular fact and the specificity required in the pleading depends on the nature of the Prosecution case. 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. Information provided through, *inter alia*, the Prosecutor's Pre-Trial Brief and his opening statement are typically adequate sources to put the accused on sufficient notice. Mere service of witness statements by the Prosecution as part of its disclosure requirements is generally insufficient.

5. However, curing is likely to occur only in a limited number of cases. While vagueness or ambiguities in the indictment may be cured by subsequently providing the timely, clear and consistent information, wholly omitted charges are impossible to cure without a formal amendment of the indictment. In addition, if the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the Chamber to amend the indictment, and the Chamber should only grant such leave if it is satisfied that it would not lead to unfairness or prejudice to the accused.

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*Imanishimwe v. The Prosecutor*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, paras. 28-32, 67, 130; *Mladen Naletilić and Vinko Martinović. v. The Prosecutor*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006 para. 27; *Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, Separate Opinion of Judge Shahbuddeen, para. 9.

6. Therefore, when deciding whether a defective indictment has been cured, the essential question is whether, depending on the specific circumstances of each case, the accused was in a reasonable position to understand the charges against him and to confront the Prosecution case. For instance, when the Appeals Chamber in the *Media* case concluded that the Prosecution had shown that the accused's ability to prepare his defence was not significantly impaired by the considered defect, it took into account the content of the accused's cross-examination of the witness and the fact that in his closing brief, the accused disputed the impugned testimony at length and in detail.

7. As a general rule, the admissibility of evidence should not be confused with the assessment of weight to be accorded to that evidence, an issue to be decided by the Trial Chamber after hearing the totality of evidence. It is necessary to stress the distinction between material facts necessary to establish an offence and the evidence offered to prove those facts; the material facts must be pleaded, the evidence need not. For instance, when an indictment alleges genocide, proof of any one killing is not a *material fact* as it would be in the case of murder; it is *evidence* of a material fact, namely that the intent of the accused was the destruction of a group, as such. Therefore, to be admissible, the evidence must in some way be relevant to an element of a crime for which the accused is charged, and when it has been found that a material fact has not been sufficiently pleaded in the indictment, this alone does not render the evidence inadmissible. The evidence can be admitted to the extent that it may be relevant to the proof of any allegation sufficiently pleaded in the indictment.

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

#### ***Reconsideration***

9. The Prosecution submits that because Joseph Nzirorera's motion is one for reconsideration of the Chamber's previous rulings, he must satisfy the legal criteria to justify such relief. Where a Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudices the accused's right to a fair trial by hindering the preparation of a proper defence. In the present case, the Chamber has clearly indicated that its rulings on

the curing of the Indictment would not preclude the Chamber to consider at a later stage their cumulative effect and therefore reconsider its decisions. The reconsideration of each individual decision might be warranted if a new circumstance or error in law is shown to justify such a remedy. The Chamber considers the present inquiry to be a reasonable one to be conducted at this time in order to clarify the case that the Defence will have to answer.

### ***Specific Exclusion Requests***

#### **Witness Ahmed Mbonyunkiza**

10. Joseph Nzirorera requests the exclusion of Ahmed Mbonyunkiza's testimony on an MRND meeting at Cyasimakamba in Kibungo in 1992 at which Mathieu Ndirumpatse was allegedly present and addressed the meeting. The Chamber recalls that this testimony was not elicited by the Prosecution, was an incidental remark in answer to a very different question posed by a Judge, and did not include evidence as to the content of the meeting.<sup>5</sup> The Chamber ruled that the fact that the meeting took place is not a material fact.<sup>6</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

11. Joseph Nzirorera also requests the exclusion of Ahmed Mbonyunkiza's testimony on the presence of Mathieu Ndirumpatse at the 19 April 1994 speeches of President Sindikubabwo and Prime Minister Kambanda in Butare. The Chamber recalls having overruled the Defence's objection to this witness' testimony on the Sindikubabwo and Kambanda speeches for going beyond the scope of the disclosures.<sup>7</sup> The Chamber finds no evidence having been given by the witness on Mathieu Ndirumpatse's presence at any of these speeches in Butare on 19 April 1994. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness G**

12. Joseph Nzirorera requests the exclusion of Witness G's testimony on the speech of Léon Mugesera on 22 November 1992. The Chamber admitted that evidence because it found that adequate notice had been given to the Accused through the Pre-Trial Brief at paragraph

<sup>5</sup> T. 21 September 2005, p. 12.

<sup>6</sup> T. 22 September 2005, p. 16.

<sup>7</sup> T. 23 September 2005, pp. 5, 7-8.

39, Witness G's anticipated witness summary,<sup>8</sup> and the Prosecution's Opening Statement.<sup>9</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

13. Joseph Nzirorera also requests the exclusion of Witness G's testimony on killings occurring in 1992 following the speech of Léon Mugesera. The Chamber recalls that the testimony was allowed only insofar as it revealed the general reaction to the speech.<sup>10</sup> The Chamber did not allow any questioning which sought to identify the individuals who were killed or the circumstances of their death, explaining that such testimony would have introduced issues not pleaded in the Indictment and for which adequate notice was not given. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

14. Joseph Nzirorera further requests the exclusion of Witness G's testimony on the 5 January 1994 swearing-in ceremony of President Habyarimana and the violence that followed. The Chamber recalls that this evidence was admitted for the limited purpose of providing historical background.<sup>11</sup> It is therefore not a material fact. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness UB**

15. Joseph Nzirorera requests the exclusion of Witness UB's testimony on arrests and murders of Tutsis in Kigali in October 1990. The Chamber recalls that this evidence was admitted for the limited purpose of providing background information.<sup>12</sup> It is therefore not a material fact. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

16. Joseph Nzirorera also requests the exclusion of Witness UB's testimony on Léon Mugesera's speech on 22 November 1992, the violence that ensued, and a meeting between MRND Kigali committee members and Mathieu Ndirumpatse concerning and following Léon Mugesera's speech. The Chamber recalls the same reasoning here as for Witness G on these events, namely that notice had been given through the Pre-Trial Brief, Witness UB's

<sup>8</sup> T. 10 October 2005, p. 51.

<sup>9</sup> T. 19 September 2005, p. 10.

<sup>10</sup> T. 10 October 2005, p. 59.

<sup>11</sup> T. 11 October 2005, p. 46.

<sup>12</sup> T. 23 February 2006, p. 15.

anticipated witness summary, and the Prosecution's Opening Statement. The Chamber notes that the testimony on the events after the speech was elicited to convey the general reaction to the speech.<sup>13</sup> In addition, the Chamber notes that after the Defence for Nzirorera objected to the admission of this Witness UB's testimony on these points,<sup>14</sup> the Defence subsequently withdrew its objection after having been presented with Witness UB's anticipated witness summary and conceding that the information was indeed contained therein.<sup>15</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

17. Joseph Nzirorera finally requests the exclusion of Witness UB's testimony on a speech by Mathieu Ndirumpatse at an MRND rally in Murambi in 1993. The Chamber recalls that while it admitted the evidence as to the fact of the rally and of the meeting having taken place, it struck out the part of the witness' testimony relating to the content of the speech.<sup>16</sup> That evidence is therefore already excluded. With respect to Joseph Nzirorera's request to exclude Witness UB's testimony on a speech by Mathieu Ndirumpatse at an MRND rally in Kibungo in 1993, the Chamber has ruled this evidence to be admissible based on the allegations contained at paragraphs 24 to 26 of the Indictment concerning MRND meetings and Ndirumpatse's alleged presence at such meeting, in conjunction with notice of the facts contained in the witness statements disclosed to the Defence.<sup>17</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### Witness ZF

18. Joseph Nzirorera requests the exclusion of Witness ZF's testimony on the participation of the Accused in a secret telecommunication network, because it is a material fact alleging participation and conspiracy in the joint criminal enterprise. The Chamber recalls its prior ruling that Witness ZF's testimony on *réseau zéro* is inadmissible to prove the material fact that the Accused participated in this network because they were not put on sufficient notice of this allegation.<sup>18</sup> The Chamber has admitted testimony on the issue only to the extent that is related to the existence of the *Akazu*, as pleaded in the Indictment at

<sup>13</sup> T. 23 February 2006, pp. 26-28.

<sup>14</sup> T. 23 February 2006, p. 25.

<sup>15</sup> T. 23 February 2006, p. 26.

<sup>16</sup> T. 27 February 2006, pp. 8-9, 11; see also T. 28 February 2006, pp. 36-38.

<sup>17</sup> T. 27 February 2006, p. 7. The Witness summary for UB annexed to the Pre-Trial Brief provides "UB will provide accounts of other MRND rallies (...) at Kibungo (chaired by Ndirumpatse, where afterwards the Interahamwe reacted violently)."

<sup>18</sup> Karemera Decision, para. 28.

paragraph 6 (iii).<sup>19</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

19. Joseph Nzirorera also requests the exclusion of Witness ZF's testimony on MRND meetings in Gisenyi in 1992-1993 in which Mathieu Ndirumpatse spoke, as well as testimony on meetings attended by Joseph Nzirorera with other leaders at a Location A in Gisenyi in 1992 and 1993 at which extermination of the Tutsis was discussed. The Chamber recalls its prior ruling that, considering the unambiguous information contained in the Pre-Trial Brief, which includes the summary of Witness ZF's anticipated testimony and was filed more than 10 months prior to Witness ZF's testimony, the witness statements adequately signaled to the Accused that the allegations on the said meetings were part of the Prosecution case. The Chamber thus found that the Accused were given timely, clear and consistent notice, and that the Defence had a reasonable opportunity to investigate these allegations. The Chamber considered that the extent of the defects in the Indictment did not materially prejudice the Accused's right to a fair trial and, accordingly, dismissed the Defence's objection. The Chamber finds no circumstance to warrant reconsideration. These requests therefore fall to be rejected.

20. Joseph Nzirorera further requests the exclusion of Witness ZF's testimony on killings of Tutsis in Bihayi *secteur* and in Mutura *commune*, Gisenyi in 1992.<sup>20</sup> The Chamber notes that this Witness' testimony on killings in Bihayi in 1992 was allowed purely as background information, as there is no allegation that any of the Accused was involved in these killings.<sup>21</sup> With respect to Witness ZF's testimony on killings in Mutura, the evidence was admitted but the Chamber expressed its concern that this line of testimony might be going beyond the parameters of the Indictment. Upon reconsideration, the Chamber does not consider the probative value of this witness' testimony on this event to warrant continued inclusion. This request is therefore granted.

21. Joseph Nzirorera finally requests the exclusion of Witness ZF's testimony on Joseph Nzirorera's presence at the distribution of weapons in Gisenyi after 6 April 1994 at a ceremony at the 47<sup>th</sup> Battalion, because it is a material fact susceptible of supporting a conviction, and involves the acts and conduct of the Accused. The Chamber notes that while the Indictment does not plead this specific event, it refers to Joseph Nzirorera's direct

<sup>19</sup> *Ibid.*

<sup>20</sup> Nzirorera's Motion refers to killings of Tutsi in Mutura *commune* in Gisenyi in 1993, but the events referred to had occurred in 1992.

<sup>21</sup> T. 16 May 2006, pp. 53-54.



participation in the distribution of weapons at paragraphs 14, 36, 39, and 62.7.<sup>22</sup> The Chamber recalls its prior ruling that the Accused had timely, consistent and clear notice that the alleged distribution of weapons to which this witness gave evidence was part of the Prosecution case, and that the Defence had a reasonable opportunity to investigate these allegations.<sup>23</sup> The Chamber considered that the extent of the defect in the Indictment did not materially prejudice the Accused's right to a fair trial, and accordingly, dismissed the Defence's objection. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness BTH**

22. Joseph Nzirorera requests the exclusion of Witness BTH's testimony on Interahamwe assaults against opposition party members in 1992. The Chamber recalls that it considered these as matters upon which no conviction could be based.<sup>24</sup> The Chamber admitted the evidence as background information related to the relationship among the political parties. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness XBM**

23. Joseph Nzirorera requests the exclusion of Witness XBM's testimony on killings of Tutsis at Mudende University in April 1994, as well as Colonel Anatole Nsengiyumva's participation in these killings. The Chamber recalls admitting evidence of the killings for the sole purpose of showing cooperation between civilian and military authorities.<sup>25</sup> It found that the massacre itself could not be a material fact that will be used against the Accused. The Chamber also ruled that although the Mudende massacre was not referred to specifically in the Indictment, nor in the Pre-Trial Brief, the reference to cooperation between civilian and military authorities before and after the massacres<sup>26</sup> was sufficient notice to allow evidence to

<sup>22</sup> Karemera Decision, para. 36.

<sup>23</sup> Karemera Decision, para. 37.

<sup>24</sup> T. 8 June 2006, p. 25.

<sup>25</sup> T. 21 June 2006, p. 1.

<sup>26</sup> Indictment at paras. 24.3, 36, 62.2 and 62.12; Pre-Trial Brief at paras. 9, 11, 14, 18 and 155; and Witness XBM anticipated summary annexed to the Pre-Trial Brief where it states "Witness will testify about cooperation between soldiers and civilians prior and during the massacres".

be given on that cooperation.<sup>27</sup> The Chamber considered that evidence of the Colonel's presence fell within this ruling. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

24. Joseph Nzirorera requests the exclusion of Witness XBM's testimony on a CDR party rally at the MRND Palace in Gisenyi in March 1994, as well as Jean-Bosco Barayagwiza's speech at this rally. The Chamber recalls its prior ruling that this meeting had been adequately pleaded in the Pre-Trial Brief,<sup>28</sup> and that the testimony was allowed because the issue of cooperation between the political parties is relevant and connected to a number of allegations in the Indictment.<sup>29</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

25. Joseph Nzirorera requests the exclusion of Witness XBM's testimony on (i) the RTLM antenna installation ceremony and the subsequent distribution of weapons in September 1993; (ii) a meeting at the Mutura communal office in January 1994; (iii) a meeting held at the Meridien Hotel in May 1994; and, (iv) the massacre of Tutsis at Nyundo parish in Gisenyi. The Chamber recalls that the totality of this evidence was admitted for the sole purpose of showing cooperation between civilian and military authorities,<sup>30</sup> an allegation which is unambiguously part of the Prosecution case.<sup>31</sup> Considering that Witness XBM did not testify that any of the Accused was present at these events, the Chamber was satisfied that a restricted admission of this evidence would not infringe upon the rights of the Accused.<sup>32</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### Witness ALG

26. Joseph Nzirorera requests the exclusion of Witness ALG's testimony on the presence of Edouard Karemera at two MRND rallies at Nyamirambo stadium, one on 23 October 1993, and the other on 16 January 1994. The Chamber recalls its prior oral ruling that while the Indictment was defective, paragraphs 79 and 80 of the Pre-Trial Brief provided adequate

<sup>27</sup> T. 21 June 2006, pp. 11-12.

<sup>28</sup> T. 8 June 2006, pp. 26-27.

<sup>29</sup> T. 21 June 2006, p. 35.

<sup>30</sup> Karemera Decision, para. 40.

<sup>31</sup> See Indictment at paras. 24.3, 36, 62.2 and 62.12, Pre-Trial Brief at paras. 9, 11, 14 18 and 155, and Anticipated Witness Summary annexed to the Pre-Trial Brief, which states: "Witness will testify about cooperation between soldiers and civilians prior and during the massacres."

<sup>32</sup> Karemera Decision, para. 41.

notice that testimony would be adduced on Edouard Karemera's attendance with other MRND leaders at these meetings.<sup>33</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

27. Joseph Nzirorera also requests the exclusion of Witness ALG's testimony on a meeting on 7 April 1994 at the *Hôtel des Diplomates* between Mathieu Ndirumpatse, Joseph Nzirorera, and Interahamwe leaders concerning roadblocks and a letter containing instructions. The Chamber only notes evidence having been given on (i) a meeting held by Mathieu Ndirumpatse on the 7<sup>th</sup> or 8<sup>th</sup> of April 1994 where he addressed the national bureau of the Interahamwe and ordered roadblocks to be set up, and (ii) a letter he wrote instructing Interahamwe to comply with orders given to them by soldiers.<sup>34</sup> The Chamber recalls having admitted this evidence because it considered that paragraphs 36 to 39 of the Indictment unambiguously put on notice the allegation that Mathieu Ndirumpatse participated in the setting of roadblocks and their control and that this was part of the Prosecution case.<sup>35</sup> There is no circumstance here to warrant reconsideration. This request therefore falls to be rejected.

28. Joseph Nzirorera finally requests the exclusion of Witness ALG's testimony on a meeting on the 10<sup>th</sup> or 11<sup>th</sup> of April 1994 at the *Hôtel des Diplomates* between MRND leaders and the Interahamwe. The Chamber recalls this evidence was admitted because adequate notice had been given to the Defence through this witness' anticipated statement summary annexed to the Pre-Trial Brief.<sup>36</sup> This meeting was also referenced generally at paragraphs 36 to 41 of the Indictment, and specifically at paragraphs 89, 124, 125, and 151 of the Pre-Trial Brief. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness HH**

29. Joseph Nzirorera requests the exclusion of Witness HH's testimony on an MRND rally in Gisenyi between February and October 1993. The Chamber recalls the Defence's prior objection to this testimony, asserting that the Witness was speaking of a rally other than the one mentioned at paragraph 25.2 of the Indictment, which indicates that in October 1993, all three Accused, as well as Colonel Théoneste Bagosora, among others, were in attendance

<sup>33</sup> T. 27 October 2006, p. 21.

<sup>34</sup> T. 26 October 2006, pp. 62-63.

<sup>35</sup> T. 30 October 2006, p. 47.

<sup>36</sup> T. 27 October 2006, pp. 4-5.

at this meeting is Gisenyi, and that Mathieu Ngirumpatse and Edouard Karemera addressed the crowd.<sup>37</sup> The Chamber reserved its ruling and allowed the testimony in order to determine whether the witness was indeed speaking of the same rally or not.<sup>38</sup> While the witness could not recall who spoke at the rally, he recalls that it took place sometime between February and October 1993 in Gisenyi, and that Colonel Bagosora, Mathieu Ngirumpatse and Joseph Nzirorera were there.<sup>39</sup> The Chamber is not convinced that the witness was not speaking of the same rally, and this is a matter for evaluation upon consideration of all the evidence. The Chamber also notes that this is not a matter on which any conviction could be based. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

30. Joseph Nzirorera also requests the exclusion of Witness HH's testimony on a meeting on 7 April 1994 between Mathieu Ngirumpatse, Joseph Nzirorera, and Interahamwe leaders concerning roadblocks and a letter containing instructions. The Chamber finds no evidence having been given by this witness on any such meeting. The Chamber does note, however, that the witness gave testimony on a letter signed by Mathieu Ngirumpatse giving instructions to the Interahamwe, and that no objection was made as to the admission of this evidence at the time.<sup>40</sup> The Chamber recalls the same reasoning as for Witness ALG, namely that the letter supports the allegation of Mathieu Ngirumpatse's control over the Interahamwe and participation in the setting up of roadblocks, allegations which are adequately pleaded in the Indictment. This request therefore falls to be rejected.

31. Joseph Nzirorera further requests the exclusion of Witness HH's testimony on a meeting on or about 11 April 1994 at the *Hôtel des Diplomates* between MRND leaders and the Interahamwe, and the distribution of weapons that followed. The Chamber recalls the Defence's request to note its objection to this witness' testimony on meetings at the *Hôtel des Diplomates*.<sup>41</sup> The Chamber reserved its ruling. In consideration of the Defence's present request, the Chamber recalls the same reasoning for admitting this evidence as it did for Witness ALG's testimony on this. This request therefore falls to be rejected.

32. Joseph Nzirorera finally requests the exclusion of Witness HH's testimony on meetings between Interahamwe leaders and the Accused in Murambi after 12 April 1994. The

<sup>37</sup> T. 9 November 2006, pp. 3-4.

<sup>38</sup> *Ibid.*

<sup>39</sup> T. 9 November 2006, p. 5.

<sup>40</sup> T. 9 November 2006, pp. 9-10.

<sup>41</sup> T. 9 November 2006, p. 18.

Chamber recalls its prior ruling that this was evidence to elucidate a fact that was generally pleaded in the Indictment (see paragraph 43) and for which due notice was given in the Pre-Trial Brief (see paragraph 129) and in the summary for Witness IIIH attached thereto.<sup>42</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness GBU**

33. Joseph Nzirorera requests the exclusion of Witness GBU's testimony on a phone call made by Joseph Nzirorera to gendarmes in order to arrange the release of Interahamwe who had attacked the Ruhengeri Court of Appeals. The Chamber admitted this evidence because (i) it supports the allegation that Joseph Nzirorera, among others, was "responsible for ordering the attack and knew or had reason to know of the attack and that the perpetrators were persons over whom they exercised effective control", as pleaded at paragraph 62.12 of the Indictment, and (ii) specific notice of this phone call was provided in Witness GBU's anticipated testimony summary in the Pre-Trial Brief.<sup>43</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness ANU**

34. Joseph Nzirorera requests the exclusion of Witness ANU's testimony on a meeting to elect Juvénal Kajelijeli as *bourgmestre* of Mukingo *commune*. The Chamber recalls that it permitted only a limited scope inquiry into Joseph Nzirorera's presence at the meeting, for the purpose of establishing his presence in Mukingo *commune* after 7 April 1994.<sup>44</sup> No details about the meeting itself were permitted. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness AMM**

35. Joseph Nzirorera requests the exclusion of Witness AMM's testimony on the presence of Edouard Karemera during the attack in Bisesero on 14 May 1994. The Chamber recalls its prior ruling that the allegation that Edouard Karemera was present at the crime scene does not

<sup>42</sup> T. 9 November 2006, p. 26.

<sup>43</sup> T. 4 December 2006, p. 35.

<sup>44</sup> T. 13 June 2007, p. 39.

amount to a radical transformation of the Prosecution's case.<sup>45</sup> The Chamber admitted the evidence because it considered that the Indictment was cured by paragraph 101 of the Pre-Trial Brief, the summary of Witness AMM's testimony and the will-say notice of 19 December 2006, and that accordingly, the Defence had been put on adequate notice in a timely manner.<sup>46</sup> The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness Jean-Bosco Twahirwa**

36. Joseph Nzirorera requests the exclusion of Witness Jean-Bosco Twahirwa's testimony on Mathieu Ngrumpatse's importation of weapons from Romania. The Chamber notes that paragraphs 14 and 24.5 of the Indictment refer to the general issues of weapons procurement and distribution. The Chamber further notes that the anticipated summary for the witness in the Pre-Trial Brief, as well as pre-trial disclosures for this witness,<sup>47</sup> specifically refer to Mathieu Ngrumpatse's involvement in the importation of weapons from Romania. The Chamber recalls its prior ruling that any vagueness in the Indictment has been cured as a result. The Chamber finds no circumstance to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness AWE**

37. Joseph Nzirorera requests the exclusion of Witness AWE's testimony on an MRND meeting in Félicien Kabuga's building in Kigali in May-August 1993. The Chamber recalls having admitted this evidence because (i) paragraph 24.6 of the Indictment generally refers to Mathieu Ngrumpatse's participation in MRND meetings in Kigali-rural, Kibungo and in several other *préfectures*, during 1993 and continuing through early 1994, and (ii) Witness AWE's anticipated summary annexed to the Pre-Trial Brief specifies that he would testify on MRND meetings around April/May 1993 and again in August 1993 attended by all three Accused. The Chamber considers the Defence to have been sufficiently notified. There is no circumstance here to warrant reconsideration. This request therefore falls to be rejected.

<sup>45</sup> T. 19 June 2007, p. 16.

<sup>46</sup> *Ibid.*

<sup>47</sup> Prosecutor's Notice pursuant to Rule 67(D) and Rule 68(A) Concerning Witness GBY, filed confidential on 17 November 2006.

38. Joseph Nzirorera also requests the exclusion of AWE's testimony on (i) an MRND rally in Rwamagana, and (ii) three MRND meetings at Rubangura's residence in Kigali in late 1992-early 1993, both meetings at which Mathieu Ndirumpatse spoke and Joseph Nzirorera and Edouard Karemera were in attendance. The Chamber recalls having admitted the evidence because paragraph 24 contains the general allegation,<sup>48</sup> which is specified by the witness' anticipated summary at paragraph 4.<sup>49</sup> The Chamber further notes that Rwamagana is located in Kibungo *préfecture*. As such, the Defence was adequately notified and this request falls to be rejected.

39. Joseph Nzirorera further requests the exclusion of Witness AWE's testimony on a meeting of the Interahamwe at the Rebero Hotel in late March 1994 attended by Mathieu Ndirumpatse at which he made a speech. The Chamber recalls having overruled the Defence's objection to this line of testimony.<sup>50</sup> The Chamber also notes paragraph 24.8 of the Indictment, which specifically refers to this meeting. There is no circumstance here to warrant reconsideration. This request therefore falls to be rejected.

#### Witness AMN

40. Joseph Nzirorera requests the exclusion of Witness AMN's testimony on the presence of Edouard Karemera during the attacks in Bisesero in May and June 1994. The Chamber recalls having overruled the Defence's objection to this line of testimony.<sup>51</sup> The Chamber notes that the Prosecution's Opening Statement<sup>52</sup> and Witness AMN's anticipated summary specifically address Edouard Karemera's presence in Bisesero during multiple attacks in May and June 1994. There is no circumstance here to warrant reconsideration. This request therefore falls to be rejected.

#### Witness GAV

41. Joseph Nzirorera requests the exclusion of Witness GAV's testimony on the 1991 killings in Mukingo *commune*. The Prosecution contends that such pre-1994 events are not material facts; rather, they are elicited to prove longstanding command and control of the

<sup>48</sup> See also Indictment, paras. 24.6 and 26.

<sup>49</sup> T. 4 July 2007, p. 10.

<sup>50</sup> T. 4 July 2007, p. 22.

<sup>51</sup> T. 1 October 2007, p. 28.

<sup>52</sup> T. 19 September 2005, pp. 16-17.

Interahamwe and a consistent pattern of conduct, which relates to generalized pleadings in paragraph 18 of the Indictment concerning the effective control that the Accused exercised over Interahamwe party youth and administrative authorities in Mukingo. The Prosecution further contends that any vagueness in the pleadings is cured by paragraphs 29, 139, 143, and 144 of the Pre-Trial Brief, including Witness GAV's anticipated summary attached thereto. However, the Chamber notes that nowhere in GAV's anticipated summary is there any reference to him testifying about attacks in Mukingo in 1991. Moreover, the Chamber notes that only in the Pre-Trial Brief, at the last sentence in paragraph 144, is there mention that Witnesses GFA, GBU, GNK, ANP, *among others*, would recount that Joseph Nzirorera would personally describe local Tutsi residents as accomplices of RPF-*Inkotanyi* "in his conversations and in various exhortations when he commanded killings of the Bagogwe in 1991 and 1993." The Chamber accepted this pre-1994 event as relevant to establishing effective control over the Interahamwe.<sup>53</sup> However, upon reconsideration, the Chamber finds that vagueness in the pleadings had not been cured, and it does not consider the probative value of this witness' testimony on this event to warrant continued inclusion. This request is therefore granted.

#### Witness AXA

42. Joseph Nzirorera requests the exclusion of Witness AXA's testimony on a 1993 meeting of Interahamwe in Bwakira *commune*, at which Edouard Karemera spoke and distributed weapons. The Chamber recalls having allowed this testimony because notice of AXA's testimony on this meeting had been adequately provided in the Pre-Trial Brief<sup>54</sup> and AXA's anticipated summary attached thereto.<sup>55</sup> There is no circumstance here to warrant reconsideration. This request therefore falls to be rejected.

#### Witness AWD

43. Joseph Nzirorera requests the exclusion of Witness AWD's testimony on a meeting on or about 11 April 1994 at the *Hôtel des Diplomates* between MRND leaders and Colonel Bagosora and the distribution of weapons to the Interahamwe. The Chamber notes that this meeting was referenced at paragraphs 38 to 41 of the Indictment, and that AWD's testimony

<sup>53</sup> T. 4 October 2007, p. 44.

<sup>54</sup> See Pre-Trial Brief, para. 82.

<sup>55</sup> T. 11 October 2007, p. 15.



on this meeting is specifically referred to at paragraph 89 of the Pre-Trial Brief, and in AWD's anticipated witness summary annexed thereto. The Defence was put on sufficient notice. There is no circumstance here to warrant reconsideration. This request therefore falls to be rejected.

#### **Witness BDW**

44. Joseph Nzirorera requests the exclusion of Witness BDW's testimony on a June 1993 MRND rally at the Kibuye stadium at which Joseph Nzirorera and Edouard Karemera made speeches. The Chamber recalls having admitted this evidence because this meeting was specifically referenced in BDW's anticipated summary annexed to the Pre-Trial Brief.<sup>56</sup> The Defence was put on sufficient notice. There is no circumstance here to warrant reconsideration. This request therefore falls to be rejected.

#### ***Cumulative Effect of Cured Defects***

45. The Chamber must now assess the totality of cured defects in the Indictment and their cumulative effect on the Accused's ability to prepare their defence. 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.<sup>57</sup> The continuous assessment of the fairness of the trial and the cumulative effect of the defects in an indictment is a continuous duty incumbent upon the Trial Chamber, which it has the power to decide upon *proprio motu*.

46. In most instances where the Defence asserts that allegations are outside the scope of the Indictment, notice was provided generally through the Indictment and specified through the Pre-Trial Brief and/or the Prosecution Opening Statement. The Pre-Trial Brief was filed on 27 June 2005, and the Opening Statement was given on 19 September 2005, when trial proceedings began. The Prosecution closed its case on 4 December 2007, over two years later, and the Defence is scheduled to present its case on 7 April 2008. On the basis of this information, any new material facts conveyed to the Defence through the aforementioned

<sup>56</sup> T. 14 November 2007, p. 45.

<sup>57</sup> See Bagosora Decision, para. 74.

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documents occurred over two and a half years before the Defence will even begin to present its case.

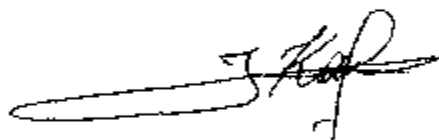
47. The Chamber has carefully reviewed the evidence presented in the Prosecution case and identified the instances in which the alleged deficiencies in the Indictment and the timing and means by which they were cured did not render the trial unfair and did not materially prejudice the Accused. The Chamber recalls that the admission of evidence is not to be confused with the consideration of its ultimate weight.

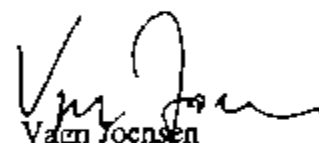
**FOR THE ABOVE REASONS, THE CHAMBER**

- I. GRANTS the Motion in part; and accordingly,
- II. DECIDES that the following pieces of evidence are inadmissible and should therefore be excluded:
  1. Witness ZF's testimony on killings of Tutsis in Bihayi *secteur* and in Mutura *commune*, Gisenyi in 1992; and,
  2. Witness GAV's testimony on the 1991 killings in Mukingo *commune*.

Arusha, 18 March 2008, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

