

6960-

ICTR-00-56-T

04-07-2008

(67084 - 67084)

67734

PM

67740



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

(67740-67730)

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 4 July 2008

The PROSECUTOR

v.

Augustin NDINDILYIMANA

Augustin BIZIMUNGU

François-Xavier NZUWONEMEYE

Innocent SAGAHUTU

Case No. ICTR-00-56-T

JUDICIAL RECORDS ARCHIVES
RECEIVED
17000 JUL - 4 - P 1:18

**DECISION ON NZUWONEMEYE'S MOTION TO EXCLUDE ACTS NOT
PLEADED IN THE INDICTMENT**

Office of the Prosecutor:

Mr Alphonse Van

Mr Moussa Sefou

Mr Segun Jegede

Mr Lloyd Strickland

Mr Abubacarr Tambadou

Ms Felistas Mushi

Ms Faria Rekkas

Ms Marlize Keefer

Counsel for the Defence:

Mr Gilles St-Laurent for Augustin Bizimungu

Mr Christopher Black and Mr Vincent Lurquin for Augustin Ndindiliyimana

Mr Charles Taku and Ms Beth Lyons for François-Xavier Nzuwonemeye

Mr Fabien Segarwa and Mr Seydou Doumbia for Innocent Sagahutu

67739

INTRODUCTION

1. The tenth trial session in this case started on 26 May 2008 with the continuation of the Accused Ndindiliyimana's defence. The Accused Nzuwonemeye began presenting his defence case on 23 June 2008.

2. On 3 March 2008, the Defence for Nzuwonemeye ("Defence") filed the current motion requesting that some of the evidence adduced during the Prosecution case be excluded because they relate to acts not pleaded in the Indictment.¹ The request includes cited references to the testimonies of Prosecution Witnesses ANK/XAF, DA, LN, AWC, ALN, DY and Alison Des Forges. The Prosecution and the other Defence teams did not respond to the Motion.

DELIBERATIONS

3. The Defence contends that its right to a fair trial, as defined in Article 20(4)(a) of the Statute of the Tribunal, was violated when the Prosecution introduced evidence of acts not charged in the Indictment. Specifically, the Defence contends that evidence led on the following acts should be excluded: the sexual assault of the Prime Minister, roadblocks, an assembly on 9 April 1994, the meeting in the night of 6-7 April 1994, RECCE reinforcement of the Presidential Guard during the night of 6-7 April 1994, the meeting on 7 April at ESM, the failure to act with respect to the UNAMIR soldiers on 7 April 1994, and the RECCE Battalion's mission to guard ministers at the Hotel Diplomat.

4. Pursuant to Rule 89 (C) of the Rules of Procedure and Evidence ("Rules"), a Chamber may admit any relevant evidence that it deems to have probative value. Evidence is deemed to be relevant if a connection exists between the evidence sought to be admitted and an element of a crime that is sufficiently pleaded in the indictment.² The Trial Chamber can exclude relevant evidence if it is determined that its probative value is substantially outweighed by the prejudicial effect.³ Admissibility of evidence should not be confused with the assessment of the weight to be accorded to the evidence, an issue that the Trial Chamber will decide after hearing the totality of the evidence.⁴

5. The Accused's right to a fair trial pursuant to Article 20 of the Statute includes the right to be informed of the charges against him in a timely manner. In *Kupreskic et al.*, the Appeals Chamber concluded that "this translated to an obligation on behalf 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."⁵ The Appeals Chamber applied the *Kupreskic et al.* reasoning in the *Natetilić and Martinović* case as follows:

¹ Nzuwonemeye Defence Motion to Exclude Evidence of Acts Not Charged, Pursuant to Article 20, ICTR Statute, filed on 3 March 2008.

² *Prosecutor v. Edouard Karemera, Mathieu Ngirumpotse and 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 (TC), 18 March 2008, para. 3.

³ *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic and Vladimir Santic*, Case No. IT-95-16-A, Judgment (AC), 23 October 2001, para. 31.

⁴ *Prosecution v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and ABZ Inadmissible" (AC), 2 July 2004, para. 15.

⁵ *Kupreskic et al.*, Judgment (AC), para. 88.

067

67738

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 for the charges in question.⁶

6. An indictment that does not set forth with sufficient detail the material facts of the Prosecution case is defective.⁷ In *Kupreskic et al.*, the Appeals Chamber emphasized that an Accused can only be convicted for crimes charged in the indictment.⁸ If the defect in the indictment is caused by an omission of a count or charge against the Accused, rather than the omission of a material fact underlying a charge, then the defect cannot be cured.⁹

7. The Appeals Chamber further held: "If the indictment is found to be defective because of vagueness or ambiguity, then the Trial Chamber must consider whether the Accused was nevertheless afforded a fair trial, or, in other words, whether the defect caused any prejudice to the Defence."¹⁰ In exceptional circumstances, a defective indictment can be cured if it is found that the Prosecution subsequently provided the Defence with "timely, clear and consistent information detailing the factual basis underpinning the charges against him."¹¹ The Appeals Chamber stated:

Whether the Prosecution cured a defect in the indictment depends, of course, on the nature of the information that the Prosecution provides to the Defence and on whether the information compensates for the indictment's failure to give notice of the charges asserted against the accused. *Kupreskic* considered that adequate notice of material facts might be communicated to the Defence in the Prosecution's pre-trial brief, during disclosure of evidence, or through proceedings at trial. The timing of such communications, the importance of the information to the ability of the accused to prepare his defence, and the impact of the newly-disclosed material facts on the Prosecution's case are relevant in determining whether subsequent communications make up for the defect in the indictment.¹²

8. The timeliness of an objection contesting the leading of evidence on a material fact not pleaded in the Indictment is important. In the pre-trial phase, the Defence can file a

⁶ *Prosecutor v. Mladen Natelilo and Vinko Martinovic*, Case No. IT-98-34-A, Judgment (AC), 3 May 2006, para. 24 (relying on *Kupreskic et al.*).

⁷ *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgment (AC), 7 July 2006, para. 22; (citing to *Kupreskic et al.*, para. 114).

⁸ *Kupreskic et al.*, para. 113; See also *Ntagerura et al.*, para. 28.

⁹ *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva*, Case No. ICTR-98-41-AR73, 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.

¹⁰ *Kupreskic et al.*, para. 114.

¹¹ *Kupreskic et al.*, para. 114; *Ntagerura et al.*, para. 28.

¹² *Bagosora et al.*, para. 29; (citing to *Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-A, Judgment (AC), 9 July 2004, para. 197).

67737

timely motion challenging the form of the indictment, and during trial it can interpose a specific objection at the time that the evidence is introduced.¹³ When the Defence objects in a timely manner, then the burden is on the Prosecution to prove that the Accused's ability to prepare his defence was not materially impaired or prejudiced.¹⁴ If on the other hand, the Accused fails to raise the objection at trial, then the onus will be on the Defence to prove that the ability to prepare its case was materially impaired or prejudiced.¹⁵ However, if the Accused does not object at the time the evidence is introduced but does so before the close of the trial, then the Trial Chamber must determine whether the burden has shifted to the Defence.¹⁶ In making that determination, "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."¹⁷

9. The Chamber will assess each request for exclusion in light of the principles outlined above.

Point 1- Sexual Assault of Prime Minister Agathe Uwilingiyimana

10. The Defence requests that allegations of sexual assault on Prime Minister Agathe Uwilingiyimana from the testimonies of Prosecution Witnesses Alison Des Forges and ANK be excluded because they are not pleaded in the Indictment and because they are more prejudicial than probative.

11. The Defence specifically requests exclusion of the evidence of sexual assault on the Prime Minister given by Witnesses Alison Des Forges and ANK, that in the context of the Prime Minister's alleged killing, a bottle was shoved into her vagina¹⁸ and that she was shot in the vagina.¹⁹ The Accused is charged with the murder of Agathe Uwilingiyimana as a crime against humanity (Count 4) and as an allegation in support of other counts in the Indictment.²⁰ Specifically in paragraph 103, the Indictment charges that the Accused tortured and killed Prime Minister Uwilingiyimana. Sexual violence can be considered a form of torture.²¹ The Chamber therefore finds that the evidence of sexual assault is relevant and admissible in support of the properly pleaded material facts relating to the charge of murder.

12. The Defence submits that the prejudicial effect of the evidence concerning sexual assault outweighs its probative value, especially since the Accused is charged with rape in two other counts on a separate set of facts (Counts 6 and 8)²², and such evidence may taint the allegations of rape already charged in those counts. The Chamber is not convinced by this

¹³ *Bagosora et al.*, para. 45.

¹⁴ *Bagosora et al.*, para. 43.

¹⁵ *Niyitegeka*, para. 199-200.

¹⁶ *Bagosora et al.*, para. 43.

¹⁷ *Bagosora et al.*, para. 45.

¹⁸ Witness Alison Des Forges, T. 20 September 2006, p. 47.

¹⁹ Witness ANK, T. 1 September 2005, p. 18.

²⁰ Paragraphs 38 and 48 (conspiracy, Count 1); paragraph 118 combined with paragraph 103 (murder as a war crime, count 7).

²¹ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (TC), 2 September 1998, paras. 597-598.

²² The Accused is charged with rape as crime against humanity (Count 6) and the Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II for rape, humiliating and degrading treatment (Count 8).

67736

argument. At the end of the case, the Chamber must determine whether each charge contained in the Indictment has been proved beyond reasonable doubt. For example, the fact that the Indictment contains multiple counts of murder does not mean evidence in respect one murder will cause prejudice to the other charges of murder. There is no reason why such prejudice should exist in the case of charges of sexual violence. As earlier stated, the evidence of sexual assault is relevant and admissible in support of the charge and circumstances surrounding the Prime Minister's murder. The Defence request is therefore denied.

Point 2- Roadblocks

13. The Defence contends that neither the Accused nor members of the RECCE Battalion were charged in the Indictment with any allegations concerning roadblocks, but that Prosecution Witness DA testified to Nzuwonemeye issuing orders and the RECCE Battalion executing such orders to put up and man roadblocks, while also ensuring compliance with the orders. It requests the Chamber to exclude all testimony from all witnesses concerning roadblocks. Although the Accused requests a blanket exclusion of all testimony regarding roadblocks, the Chamber will only evaluate the precise evidence indicated by the Defence in its Motion, such as that of Witness DA and Witness Colonel Marchal.

14. Witness DA testified that following President Habyarimana's plane crash on 6 April 1994, an assembly was convened at Camp Kigali attended by 300 to 350 soldiers. He said that Major Nzuwonemeye addressed the assembly and ordered that vehicles be brought out to block the road to the Prime Minister's residence as well as other roads. He further testified that the vehicles were brought out that night.²³ Witness Marchal testified that there were soldiers from the RECCE Battalion at certain roadblocks, which delayed a UNAMIR detachment sent to escort Prime Minister Uwilingiyimana to Radio Rwanda. The Chamber overruled a Defence objection to this evidence on the basis that it was adduced in the context of how Witness Marchal was unable to accomplish the task of escorting the Prime Minister.²⁴

15. When read together, Paragraph 38 and 39 of the Indictment, relating to the count of conspiracy to commit genocide, state that before the Prime Minister, Agathe Uwilingiyimana, and the 10 Belgian UNAMIR soldiers were killed on 7 April 1994, the Accused Nzuwonemeye assembled his troops at Kigali Military Camp to inform them of the President's death. In his address to the troops, it is alleged that he identified the enemy as the RPF and called on his troops to eliminate its accomplices within the country before taking on the enemy. The Chamber finds that this allegation is sufficiently precise, as it indicates the time of the event, its location, the persons present and the general content of an address given by the Accused.

16. The Chamber finds that Witnesses DA and Marchal's testimonies concern the event alleged in paragraph 39 of the Indictment. Witness DA's testimony regarding the roadblocks is part of the specific contents of the Accused's address and instructions to the troops at Camp Kigali, and the realization of those instructions. As noted by the Chamber during Witness Marchal's testimony, his evidence regarding the roadblocks was given within the context of the events surrounding the Prime Minister's death. As evidence adduced in support of a properly pleaded allegation in the Indictment, the Chamber concludes that

²³ T. 11 January 2005, pp. 40, 44, 47-48.

²⁴ T. 21 January 2008, pp. 58-65.



84039
67735

Witnesses DA and Marchal's testimonies regarding roadblocks is relevant and admissible and rejects the Defence's request for its exclusion.

Point 3- Assembly on 9 April 1994

17. The Defence requests the exclusion of Prosecution Witness ANK/XAF's testimony in so far as it relates to the Accused, in his capacity as Commander of the RECCE Battalion, addressing troops at an assembly on 9 April 1994.

18. During examination-in-chief, Prosecution Witness ANK/XAF testified that apart from the meeting held on the night of 6 April 1994 at Camp Kigali, he also recalled a subsequent meeting that had taken place in the afternoon of 9 April 1994, although he could not be sure of the date, but it was some days after the death of President Habyarimana. Prosecution Witness ANK/XAF testified that the Accused was present at this assembly and addressed the soldiers who had remained at the camp.²⁵ Witness ANK/XAF's recounted Major Nzuwonemeye's speech as follows:

"Major Nzuwonemeye said words to the effect that the soldiers who were still in the camp had to go out and go to the war front and help the others. He then criticised the soldiers who were not assisting the others. He made specific reference to me, saying that I took food stock to Tutsi and that I killed another Hutu. And when he said this, he was looking specifically at me. He added that soldiers, such as myself, should be sacked from the army and that I should also go and participate in the fighting, even though it was known that I had a health problem and I had a certain level of disability so that I should not be participating in the fighting."

ANK/XAF further explained that following the meeting, squadron leaders ordered their troops to go to various places, and some of them went to Nyamirambo where killings took place.²⁶

19. The Chamber notes that this particular meeting is not specifically mentioned in the Indictment. The Defence, however, is not clear why it wants the meeting to be excluded, or how parts or the whole of the meeting are prejudicial to the Accused; it simply asks that the entire meeting be excluded because it is not mentioned in the Indictment. During the examination-in-chief of Witness ANK/XAF, the Defence objected to evidence of killings at Nyamirambo as new crime sites, and that the testimony was inadmissible hearsay. The Chamber further notes, however, that no specific objection was raised about the alleged meeting of 9 April.²⁷ Furthermore, Defence Counsel cross-examined the Witness on the meeting and challenged the possibility that meeting took place.²⁸

20. The Chamber finds that having failed to raise a timely objection to the meeting, and having proceeded to cross-examine Witness ANK/XAF on it, the Defence has not shown as the moving party, how the requested testimony is prejudicial to the Accused and why it should be excluded. The Chamber therefore denies this Defence request for exclusion.

Point 4- Meetings of 6-7 April 1994

²⁵ T. 1 September 2005, pp. 27-28.

²⁶ T. 1 September 2005, p. 29.

²⁷ T. 1 September 2005, pp. 29-38.

²⁸ T. 2 September 2005, pp. 16-18.



67038
67734

21. The Defence submits that evidence from Prosecution witnesses, including, but not limited to Witnesses AWC, ALN, DY, and LN regarding the Accused's presence at a meeting in the night of 6-7 April 1994, should be excluded. It avers that the evidence is prejudicial since it is relied upon to support the charge of conspiracy in the Chamber's Decision on Defence Motions Pursuant to Rule 98 *bis*²⁹, but is not pleaded in the Indictment in relation to the Accused.

22. During examination-in-chief, Prosecution Witness AWC testified that on the night of 6-7 April 1994, he received a phone call from Colonel Bagosora requesting that the Accused Nzuwonemeye be informed that there would be a meeting of the general staff headquarters.³⁰ Prosecution Witness AWC testified that the Accused briefly spoke to Colonel Bagosora over the phone, and shortly thereafter, left the building heading in the direction of the meeting venue.³¹ Prosecution Witness AWC went on to testify that after the meeting, the Accused returned to his office around 4 or 5 a.m. and convened a meeting of the squadron commanders. Counsel for Nzuwonemeye did not object to the evidence being led and cross-examined the witness on the Accused's alleged presence at this meeting.³²

23. Witness ALN testified that on the night of 6-7 April 1994 the Accused Nzuwonemeye attended a meeting held at the Chief of Staff's office located within Camp Kigali. Witness ALN testified that he knew where the meeting was held because the Accused received a phone call, and after that, he saw the participants entering the meeting hall, including G2 and G3 officers, Colonel Bagosora and Major Ntabakuze.³³ Witness ALN testified that the meeting lasted approximately forty-five minutes after which the Accused called a meeting of the squadron commanders within RECCE Battalion.³⁴ Counsel for the Accused did not make any contemporaneous objections to this line of questioning and cross-examined the witness extensively on the issue, even entering an exhibit to contradict Nzuwonemeye's presence at the meeting.³⁵

24. Prosecution Witness DY testified that on the night of 6-7 April 1994, after Major Nzuwonemeye made a statement to the RECCE Battalion regarding the President's death, a warrant officer informed the Major that he had received a telephone call from headquarters. According to Witness DY, the Accused went to his office to receive the telephone call, spoke to the person on the other line, came out of his office and told Captain Sagahutu that he was going to attend a meeting at headquarters.³⁶ Counsel for the Accused did not make any contemporaneous objections to this line of questioning pursued by the Prosecution; nor did he cross-examine the witness on the issue.³⁷

25. The Defence also objects to the admission of Prosecution Witness LN's testimony about a meeting allegedly held on the night of 6 April 1994 in the x-ray building of the military hospital. Witness LN testified that the purpose of the meeting was to avenge the death of the President and to find ways of killing opposition politicians. The meeting was

²⁹ Filed 20 March 2007.

³⁰ T. 18 January 2006, p. 28-29.

³¹ T. 18 January 2006, pp. 29-30.

³² T. 18 January 2006, pp. 60-62, 67-68; T. 19 January 2006, pp. 5-7.

³³ Although Ntabakuze is spelled in a different way, it is clear from the circumstances that the person referred to is indeed Major Ntabakuze.

³⁴ T. 29 September 2004, pp. 44-44.

³⁵ T. 5 October 2004, pp. 3-16.

³⁶ T. 23 January 2006, pp. 35-36.

³⁷ T. 24 January 2006, p. 11-51.



chaired by Colonel Bagosora and attended by other senior military officials including Ntabakuze and Ntibihora. At some point in the night, the meeting was adjourned and transferred to another location, thought to be the general staff headquarters.³⁸ During examination-in-chief, Counsel for the Accused objected to the testimony on the basis of hearsay and that the questions were leading.³⁹ However, no objection was raised alleging lack of notice. Furthermore, the Defence cross-examined the witness on the meeting.⁴⁰

26. The Chamber notes that neither the meeting of the officers of the general staff, nor its alleged predecessor in the x-ray room held during the night of 6-7 April 1994, is mentioned in the Indictment. Under the count of conspiracy to commit genocide, Nzuwonemeye is specifically charged with the killing of Prime Minister Agathe Uwilingiyimana and her 10 Belgian UNAMIR escorts, and with a meeting prior to the alleged murders at Kigali military camp over which he presided.⁴¹ More generally, elements of the Presidential Guard, the Reconnaissance Battalion and *Interahamwe* are accused of murdering or seeking to murder all political figures in the opposition.⁴²

27. At the contested meeting, which allegedly took place on the same night that President Habyarimana's plane crashed, witnesses have testified that Nzuwonemeye was present along with Colonel Bagosora and other senior military officials. Due to the timing of the alleged meeting and the seniority of those military officials present, the Chamber finds that it is a material fact to support the count of conspiracy and should have been pleaded in the Indictment.⁴³

28. The Chamber notes, as mentioned above, that the Defence made no contemporaneous objection when the four witnesses testified about Nzuwonemeye's presence at the 6-7 April 1994 meeting and no reasonable explanation had been provided for its failure to object at the time the evidence was introduced or as soon as possible thereafter. This means that the burden shifts to the Defence to show that it suffered prejudice in the preparation of its case. The Defence asserts that it has suffered prejudice since the Chamber used the testimony about the meeting in support of its Decision on the Defence's motion for acquittal to retain the charge of conspiracy in the Indictment.⁴⁴ The Chamber, however, finds that the Defence cross-examined Witnesses AWC, ALN and LN on the issue of the meeting, and even admitted exhibits contradicting the Accused's presence at the meeting.⁴⁵ In the case of Witness DY, the Defence had notice that the witness would speak to that meeting from his witness statement, but chose not to cross-examine him on the meeting.⁴⁶ Furthermore, the Defence for Nzuwonemeye has only just begun to substantially present its case and has time to call witnesses to defend against this allegation, and avoid any real prejudice. The Chamber

³⁸ T. 12 September 2005, pp. 54-61, 66.

³⁹ T. 12 September 2005, pp. 59-61.

⁴⁰ T. 14 September 2005, pp. 21-22.

⁴¹ See paragraph 38 of the Indictment.

⁴² See paragraph 48 of the Indictment.

⁴³ See similar factual circumstances in *Prosecutor v. Dario Kodic and Mario Cerkez*, Case No. IT-95-14-2/A, Judgement (AC), 17 December 2004, paras. 144 and 147, where a certain meeting was deemed to be a material fact that should have been pleaded in the Indictment. The meeting was between civilian and military leaders and preceded a massacre that took place the following day. See also *Kodic and Cerkez*, Judgement (TC), 26 February 2001, para. 631.

⁴⁴ Decision on Defence Motions Pursuant to Rule 98 bis, 20 March 2007, para. 18, point 11 (Corrigendum filed on 18 June 2007).

⁴⁵ See exhibit no. D5; T. 18 January 2006, pp. 67-68.

⁴⁶ Witness Statement, Prosecution Witness DY, 2 October 1997.

67056
67732

concludes that the Defence for Nzuwonemeye has not suffered any prejudice by the introduction of evidence regarding the 6-7 April 1994 meeting. The Chamber denies the request.

Point 5- RECCE reinforcement of Presidential Guard at Prime Minister's Residence and Kimihurura

29. The Defence requests exclusion of evidence from Prosecution Witnesses AWC and ANK/XAF that following the meeting with squadron commanders on the night of 6-7 April 1994, Nzuwonemeye ordered Captain Innocent Sagahutu to deploy his soldiers to reinforce the Presidential Guard at the Prime Minister's house, and the subsequent execution of that order. The Defence claims that this testimony relates to acts not charged in the Indictment.

30. The Chamber recalls that under the charge of conspiracy, the Indictment alleges responsibility on the part of elements of the RECCE Battalion for the murder of Prime Minister Agathe Uwilingiyimana and her 10 Belgian UNAMIR escorts (paragraph 38), and that prior to these murders, the Accused Nzuwonemeye assembled a meeting at Camp Kigali to inform his troops of the death of President Habyarimana (paragraph 39). The Indictment also alleges that elements of the Presidential Guard and the RECCE Battalion assassinated many Rwandan political figures (paragraphs 40 and 48). Count 4 of the Indictment charges Nzuwonemeye with the murder of Prime Minister Agathe Uwilingiyimana, ten Belgian UNAMIR peacekeepers, and others as crimes against humanity (paragraphs 103-105). Count 7 of the Indictment charges the Accused with the murder of the ten Belgian UNAMIR soldiers, amongst others, as a violation of Article 3 Common to the Geneva Conventions and Additional Protocol II.

31. The Chamber finds that the witnesses' evidence regarding Nzuwonemeye's alleged orders is relevant to the above charges in the Indictment. Here, the material facts are that there was a conspiracy to kill the Prime Minister and others, that those killings took place on 7 April 1994 at her house, and that the Accused bears responsibility for those acts through the actions of soldiers under his command. The Chamber finds that these facts are sufficiently pleaded, and that the testimony in question was led to support those facts. The Defence request for exclusion is therefore denied.

Point 6- 7 April Meeting at ESM

32. The Defence for Nzuwonemeye requests that the evidence by Prosecution Witness DA on the Accused's participation in the 7 April 1994 meeting at ESM be excluded because it is an act not pleaded in the Indictment. It notes that this act was relied upon by the Chamber in its decision on the Accused's motion for acquittal pursuant to Rule 98 bis following the completion of the Prosecution's case, as evidence, which, if believed, could support the charge of conspiracy.

33. Witness DA testified that Major Nzuwonemeye, in his capacity as commander of the RECCE Battalion attended a meeting on 7 April 1994 between 9:00 and 10:00 am with almost all senior officers at the *École Militaire Supérieure* (ESM).⁴⁷

⁴⁷ T. 11 January 2005, pp. 55-56.

67731

34. The Chamber notes that the meeting of 7 April 1994 at ESM is specified in the Indictment, however no reference is made to Nzuwonemeye's involvement in the meeting.⁴⁸ Counsel for the Accused did not object to the evidence as it was adduced and did not question the witness regarding the Accused's alleged attendance at the meeting throughout the Counsel's three-day cross-examination.⁴⁹ Prosecution Witness DA testified over three years ago, and the Defence has not given any explanation as to why an earlier objection was not made. At this stage of the proceedings, in order for the Chamber to exclude this evidence, the Defence must show that its ability to prepare its case was materially impaired or prejudiced by the admission of the evidence. The Defence explains that it has been prejudiced because in its decision on a motion for acquittal, the Chamber relied on the evidence to deny acquittal on the charge of conspiracy to commit genocide.⁵⁰

35. The Chamber recalls that a Rule 98 *bis* Decision does not make a finding of guilt, but determines whether the Accused should be acquitted on a charge because of lack of evidence adduced in its support. In this case, the Chamber's Rule 98 *bis* Decision relied on the evidence of Nzuwonemeye's presence at the ESM meeting as only one of many examples to maintain the charge of conspiracy against the Accused. The Chamber also recalls that the bulk of the Accused's case has not yet started, and so the Defence still has time to call witnesses to testify against this allegation if it so wishes. The Chamber therefore finds no prejudice to the Defence by maintaining the evidence regarding the 6-7 April 1994 meeting and denies the Defence request.

Point 7- Failure to Act on 7 April in Respect to the Belgian UNAMIR soldiers

36. The Defence requests the exclusion of any testimony alleging the Accused's failure to act during the meeting on 7 April 1994 on grounds that this failure to act is not charged in the Indictment.

37. In the Motion, the Accused points to no specific witness testimony where his presence and failure to act at the meeting on 7 April 1994 is alleged.⁵¹ Without being seized of precise evidence which is alleged to be prejudicial, the Chamber dismisses the Accused's request for exclusion on this point.

Point 8- RECCE Guards at the Hotel Diplomat

38. The Defence requests the exclusion of all evidence, not limited to Prosecution Witness DY's testimony, in so far as it relates to members of the RECCE Battalion on 7 April 1994 who were given a mission to protect MRND ministers and prominent members of President Habyarimana's circle at the Hotel Diplomat. The Defence moves for exclusion on the basis that this act is not charged in the Indictment although it is charged in a prior Indictment.

39. During his testimony, the witness described his participation in this mission, which started on 8 April 1994, although he was at the hotel on 7 April 1994 as well. He recalled seeing Casimir Bizimungu, Pauline Nyiramasuhuko, Justin Mugenzi and Aneaus

⁴⁸ See paragraph 47.

⁴⁹ T 12 January 2005, T 18 January 2005, T 19 January 2005.

⁵⁰ Decision on Defence Motions Pursuant to Rule 98 *bis*, 20 March 2007, para. 18, point 11 (Corrigendum filed on 18 June 2007).

⁵¹ Defence Motion, paras. 60-62.



67054

67730

Ntamabyaliro, and soldiers such as Augustin Ndindiliyimana, Augustin Bizimungu, Colonel Ntibigaraba, and Major Karangwa in the course of his mission. The witness did not specify whom he saw on what date, at what time, and the activities they supposedly engaged in.⁵²


40. The Chamber notes that the Defence has not indicated any prejudice it has suffered through Witness DY's testimony concerning the mission to protect some politicians at the Hotel Diplomat. In addition, no contemporaneous objection was made during the testimony, nor was the witness cross-examined on his mission.⁵³ The Chamber finds that without an indication of why and how the testimony is prejudicial to the Defence, the request is dismissed.

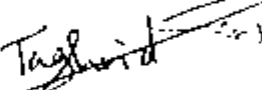
THE CHAMBER THEREFORE

DENIES the Motion in its entirety.

Arusha, 4 July 2008




Asoka de Silva
Presiding Judge


Taghrid Hikmet
Judge
[Seal of the Tribunal]


Seon Ki Park
Judge

⁵² T. 23 January 2008, pp. 57, 60.

⁵³ T. 24 January 2006, pp. 11-51.