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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Solomy Balungi Bossa
Judge Mparany Rajohnson

Registrar: Mr. Adama Dieng

Date: 25 June 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-PT

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**DECISION ON DEFENCE MOTIONS OBJECTING
TO THE PROSECUTION'S PRE-TRIAL BRIEF**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Ms. Mylène Dimitri

[Handwritten signature]

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Solomy Balungi Bossa, and Mparany Rajohnson (the "Trial Chamber");

BEING SEIZED of the "Defence Objections to the Prosecution's Revised Pre-Trial Brief", filed on 10 June 2009 (the "First Motion") and the "Defence Objections to the Prosecution's Clarifications to the Revised Pre-Trial Brief Made Pursuant to Court Order Dated 2 June 2009", filed on 15 June 2009 (the "Second Motion");¹

CONSIDERING:

a) The "Prosecution's Rejoinder to the Defence Objections to the Prosecution's Revised Pre-Trial Brief," filed on 15 June 2009 (the "Response to the First Motion");

b) The "Defence Reply to the Prosecutor's Rejoinder to the Defence Objections to the Revised Pre-Trial Brief," filed on 22 June 2009 (the "Reply to the Response to the First Motion");

c) The "Prosecutor's Response to the Defence Objections to Prosecutor's Clarifications to the Revised Pre-Trial Brief," filed on 17 June 2009 (the "Response to the Second Motion");

d) The "Defence Reply to Prosecutor's Response to the Defence Objections to Prosecutor's Clarifications to the Revised Pre-Trial Brief," filed on 19 June 2009 (the "Reply to the Response to the Second Motion");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motions pursuant to Rule 73(A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 2 June 2009, the Chamber granted in part the Defence Motion objecting to the Prosecution's Pre-Trial Brief.² The Chamber ordered the Prosecution to submit within five days a revised exhibit list with references to the paragraphs of the Amended Indictment and Pre-Trial Brief the exhibits are relevant to; to clarify certain paragraphs of the Pre-Trial Brief; and to delete from the Pre-Trial Brief all references

¹ Both Motions were filed by the former Lead Counsel for the Accused, who has since been withdrawn. See Decision Withdrawing David Thomas as Counsel for the Accused Augustin Ngirabatware, 16 June 2009.

² Decision on Defence Motion Objecting to the Prosecution's Pre-Trial Brief, 2 June 2009 (the "2 June Decision"); see The Prosecutor's Revised Pre-Trial Brief (filed pursuant to Court Order dated 19 May 2009 and Rule 73 (B) (1) *bis* of the Rules of Procedure and Evidence), filed 25 May 2009 ("Pre-Trial Brief").

to witnesses who are not expected to testify in this case. On 8 June 2009, the Prosecution filed clarifications to its revised Pre-Trial Brief.³

2. On 10 June 2009, the Defence filed the First Motion, again objecting to the Prosecution's revised Pre-Trial Brief, and on 15 June 2009, the Defence filed the Second Motion, challenging the adequacy of the Prosecution's clarifications to its revised Pre-Trial Brief.

3. In the interests of justice and judicial economy, the Chamber will address both the First Motion and the Second Motion in this Decision.

SUBMISSIONS OF THE PARTIES

First Motion

4. The Defence first objects to the Prosecution's addition of a witness, the Prosecution Investigator, to its witness list without the permission of the Trial Chamber. The Defence asserts that the Prosecution failed to fulfil its Rule 73 *bis* obligation to file a motion to obtain leave of the Trial Chamber before amending its witness list.⁴ In addition, the Defence asserts, the Prosecution failed to identify in its Pre-Trial Brief which paragraphs of the Indictment⁵ the Investigator's testimony will support.⁶

5. The Defence further reiterates its objection to the Prosecution's witness grid, which it alleges connects several witnesses to paragraphs of the Amended Indictment which their statements do not support. Noting that the Chamber previously rejected this claim as unsubstantiated and inadequately specific, the Defence alleges ten specific flaws in the grid:

- i. Witness ANAD's statement does not support paragraphs 17, 18, or 39 of the Amended Indictment, as reflected in the Prosecution's witness grid;⁷
- ii. Witness ANAE's statement does not support paragraphs 17, 18, or 20 of the Amended Indictment, as reflected in the Prosecution's witness grid;⁸
- iii. Witness ANAG's statement does not support paragraphs 16, 17, 22, 40, and 50 of the Amended Indictment, as reflected in the Prosecution's witness grid;⁹
- iv. In the only translation of Witness ANAJ's statement which includes a calendar year, the witness asserts his family was murdered in 1998. The Defence

³ Prosecution's Clarifications to the Revised Pre-Trial Brief Made Pursuant to Court Order Dated 2 June 2009 and Rule 73 *bis* of the Rules of Procedure and Evidence ("Clarifications to the Pre-Trial Brief").

⁴ First Motion, para. 12.

⁵ Amended Indictment, filed on 14 April 2009 ("Indictment").

⁶ First Motion, para. 43.

⁷ First Motion, paras. 19-22.

⁸ First Motion, paras. 23-25.

⁹ First Motion, paras. 26-29.

consequently concludes that any wrong done to ANAJ falls outside the temporal jurisdiction of this Tribunal;¹⁰

- v. Witness ANAK's statement does not support paragraph 21 of the Amended Indictment, as reflected in the Prosecution's witness grid;¹¹
- vi. Witness ANAL's statement does not support paragraphs 50, 52, or 62 of the Amended Indictment, as reflected in the Prosecution's witness grid;
- vii. Witness ANAM's statement does not support paragraph 32 of the Amended Indictment, as reflected in the Prosecution's witness grid;
- viii. The Prosecution's summary of Witness ANAN's statement is inaccurate insofar as where Witness ANAN stated that "members of the population" killed a Tutsi Priest after the announcement that a plane crash had killed President Juvenal Habyarimana, the summary indicates that "the *Interahamwe*" killed the Priest;¹²
- ix. Witness ANAO's statement does not support paragraphs 10, 11, 12, 13, or 14 of the Amended Indictment, as reflected in the Prosecution's witness grid;¹³
- x. Witness ANAP's statement does not support paragraphs 4 or 5 of the Amended Indictment, as reflected in the Prosecution's witness grid.¹⁴

6. The Defence also notes two dissimilarities between the Prosecution's Summary of Witnesses' Anticipated Testimonies (the "Summary"), dated 22 May 2009, and the Prosecution's Revised Order of Appearance (the "Order of Appearance"), filed on 12 May 2009. The Defence submits that the Summary reflects that the Prosecution will offer two weeks of testimony, while the Order of Appearance reflects that the Prosecution will offer three weeks of testimony.¹⁵ Moreover, the Defence notes, Witness ANAH was not listed in the Order of Appearance, but was listed in the Summary.¹⁶

7. Consequently, the Defence asks that the Trial Chamber order the Prosecutor to file a revised and corrected annex and witness grid and resolve the discrepancies between the Summary and Order of Appearance as to the length of the Prosecution's case and whether Witness ANAH will be called to testify. The Defence further requests that the Trial Chamber preclude the Prosecution from adding the Investigator as a new witness.¹⁷

¹⁰ First Motion, para. 30; *see* Statute, Article VII (directing that this Tribunal has jurisdiction only over offences committed between 1 January 1994 and 31 December 1994).

¹¹ First Motion, para. 31.

¹² First Motion, para. 37.

¹³ First Motion, para. 38-41.

¹⁴ First Motion, para. 42.

¹⁵ First Motion, paras. 44-45.

¹⁶ First Motion, para. 46.

¹⁷ First Motion, para. 47.

Response to the First Motion

8. The Prosecution asks that the First Motion be dismissed in its entirety.¹⁸ It observes that Rule 66 disclosure is intended to afford the Accused adequate notice of the allegations against him so that he may defend himself against the charges brought by the Prosecution. Such disclosure is not, the Prosecution avers, intended to permit the Accused to conduct a “trial by pleadings.”¹⁹

9. The Prosecution asserts that the Defence objections to the Prosecution’s addition of its Investigator as a witness through the pre-Trial Brief are meritless. The Prosecution notes that at the time the Pre-Trial Brief was filed, there was no effective date of trial, and so the Prosecution concludes that it cannot have failed to provide the Defence 60 days’ notice of the substance of the Investigator’s testimony. The Prosecution further argues that the Investigator is not a factual witness.

10. The Prosecution further rejects the Defence’s contentions that various Prosecution witnesses’ statements do not support the paragraphs of the Indictment specified in the Prosecution’s witness grid. Specifically, the Prosecution asserts:

- i. Witness ANAD will testify to the perception of the Accused’s relationship with Faustin Bagango in the commune, relevant to paragraph 17 of the Indictment; the Accused’s alleged public support of Bagango, the MRND, and the *Interahamwe* at public rallies, relevant to paragraph 18 of the Indictment; and, as to paragraph 39 of the Indictment, Witness ANAD will testify that he attended many of the Accused’s public rallies and observed a pattern of conduct by the Accused which corroborates the allegations in the Indictment, and that he occasionally visited Nyamyumba commune during the relevant time period and can testify to events which occurred there;²⁰
- ii. Witness ANAE will testify to the perception in the commune of the Accused’s relationship with Bagango, as well as the familial link between the Accused and Nyamyumba commune, relevant to paragraph 17 of the Indictment; and witnessing interactions between the Accused and Bagango, including occasions when the Accused supplied Bagango with weapons, which the Prosecution contends constituted “open support” and so are relevant to paragraph 18 of the Indictment. The Prosecution avers generally that Witness ANAE’s “anticipated testimony” will link the Accused with paragraph 20 of the Indictment;²¹
- iii. Witness ANAG will testify to witnessing a meeting where the Accused arrived carrying weapons, supporting paragraph 16 of the Indictment; witnessing the Accused distributing weapons to members of *Interahamwe* militias as described

¹⁸ Response to the First Motion, paras. 36-39.

¹⁹ Response to the First Motion, paras. 4-5.

²⁰ Response to the First Motion, paras. 7-10.

²¹ Response to the First Motion, paras. 11-13.

in paragraph 20 of the Indictment; witnessing a meeting at which the Accused advocated killing Tutsis, supporting paragraphs 22 and 40 of the Indictment; and witnessing the Accused distributing a variety of weapons, including machetes, at a meeting at his parents' residence, supporting paragraph 50 of the Indictment;²²

- iv. Witness ANAJ will testify to the death of his family, providing context for the count in the Indictment which alleges the Accused is guilty of conspiracy to commit genocide;²³
- v. Witness ANAK will testify to the Accused's *de facto* control over members of the *Interahamwe* through his position of local authority and connections with local leaders;²⁴
- vi. Witness ANAL will testify to the distribution of machetes by Bagango to members of the *Interahamwe*, thus completing the chain of distribution of machetes which ANAG will testify the Accused provided to Bagango; Witness ANAL will testify as to the distribution of grenades, corroborating testimony from other witnesses; and Witness ANAL will corroborate the whereabouts of Denise Nyirabunori, who Paragraph 62 of the Indictment alleges was raped while hiding in the Accused's brother's home;²⁵
- vii. Witness ANAM will testify "to the killing of one Safari marked for death by the Accused," thus supporting paragraph 32 of the Indictment;²⁶
- viii. Since the *Interahamwe* were also "members of the population," there is no conflict between Witness ANAN's statement that "members of the population" killed a Tutsi Priest and the Prosecution's summary that "the *Interahamwe*" killed the Priest;²⁷
- ix. Witness ANAM will testify to the meeting referenced in paragraph 12 of the Indictment; a pattern of conduct relevant to paragraph 13 of the Indictment; the creation of a roadblock shortly after a meeting attended by the Accused, as referenced in paragraph 13 of the Indictment; and the erection of additional roadblocks referenced in paragraph 14 of the Indictment;²⁸
- x. Witness ANAP will testify to the Accused's *de facto* and *de jure* functions in the Ministry, and his embezzlement of public funds.²⁹

²² Response to the First Motion, paras. 14-17.

²³ Response to the First Motion, para. 18.

²⁴ Response to the First Motion, para. 19.

²⁵ Response to the First Motion, paras. 20-22.

²⁶ Response to the First Motion, para. 23.

²⁷ Response to the First Motion, para. 24.

²⁸ Response to the First Motion, paras. 25-27.

²⁹ Response to the First Motion, para. 28.

11. As regards the alleged discrepancies between the Prosecution's Summary and its Order of Appearance, the Prosecution avers that the periods of time estimated for the presentation of its case in the Summary and Order of Appearance are both estimates, and clarifies further that Witness ANAH will not be called to testify.³⁰

Reply to the Response to the First Motion

12. The Defence avers that it is raising challenges to the Prosecutor's witness grid at the proper stage, rather than engaging in a trial by pleadings. The Defence notes that disclosure of witness statements is inadequate to give an Accused person notice of the charges against him, and argues that the Prosecution is over-linking witness statements to paragraphs of the Indictment by linking the statements to all facially similar allegations.³¹

13. The Defence further asserts that witnesses may not testify to facts outside the scope of their witness statements.³²

14. The Defence reiterates its objections to the connections between statements by Witnesses ANAD, ANAE, ANAG, ANAK, ANAL, and ANAO and the paragraphs of the Indictment which the Prosecutor alleges their testimonies will support.³³

15. Finally, the Defence reiterates its objections relating to the OTP Investigator.³⁴

Second Motion

16. As regards the filing of the Prosecution's Revised Exhibit List³⁵, the Defence asserts that the Revised Exhibit List is inadequate in several particulars. Specifically, the Defence argues:

- xi. Exhibit 1, a Report on the use of Rwanda's external debt, does not support any paragraph of the Indictment,³⁶
- xii. Exhibit 2, an Annex to Exhibit 1, "do[es] not even mention the name of [the Accused]" and similarly does not support any of the allegations in the Indictment,³⁷
- xiii. Exhibit 3, Notes and Details with Regards to Exhibit 4, cannot support paragraphs 13-16, 19-20, 27, 34-37, 50, or 60 of the Indictment because it

³⁰ Response to the First Motion, para. 35.

³¹ Reply to the Response to the First Motion, paras. 9-19.

³² Reply to the Response to the First Motion, para. 25 (citing *Prosecutor v. Simba*, No. ICTR-2001-76-T, Judgement (13 December 2005), para. 34).

³³ Reply to the Response to the First Motion, paras. 21-71.

³⁴ Reply to the Response to the First Motion, paras. 72-73.

³⁵ Addendum A to the Clarifications to the Revised Pre-Trial Brief.

³⁶ Second Motion, paras. 14-31.

³⁷ Second Motion, paras. 32-34.

consists of notes and drawings by the Prosecution's Investigator made of locations which do not appear in any of those paragraphs of the Indictment;³⁸

- xiv. Exhibit 4, which consists of sketch plans and locations of roadblocks and other landmarks prepared by the Prosecution Investigator, does not support the identified paragraphs of the Indictment. Rather, the various drawings and sketches each allegedly support paragraphs of the Indictment which do not refer to the locations which the drawings and sketches allegedly represent.³⁹

17. The Defence further contends that many of the Prosecution's Exhibits do not support the referenced paragraphs of the Prosecution's Pre-Trial Brief. Specifically, the Defence maintains:

- xv. Exhibit 1 does not support paragraphs 39, 41, 42, 43, 45, 48, 53, 54, 56, 57, 59, 60, 64, or 66 of the Prosecution's Pre-Trial Brief;⁴⁰
- xvi. Exhibit 2 does not contain the name of the Accused, but is merely a series of tables, and so cannot support any paragraph of the Pre-Trial Brief;⁴¹
- xvii. Exhibit 3 does not support paragraphs 33 or 75 of the Pre-Trial Brief;⁴²
- xviii. Exhibit 4h does not support paragraphs 32 or 75 of the Pre-Trial Brief;⁴³
- xix. Exhibit 4j "cannot go in support of the acts for which the Accused is charged."⁴⁴

18. The Defence next asserts that the Prosecution failed to clarify which allegation in the Indictment the material facts contained in paragraphs 57-61 of its Pre-Trial Brief are intended to support. The Defence notes that this Chamber's Decision ordered the Prosecutor to clarify whether those paragraphs supported paragraph 27 of the Indictment or paragraph 50. The Defence contends that, in response, the Prosecutor disclosed a table connecting the aforementioned paragraphs to numerous paragraphs of the Indictment, and that to do so was unjustified.⁴⁵

19. The Defence further argues that the relevant paragraphs of the Pre-Trial Brief do not support the paragraphs of the Indictment to which the Prosecution connects them. Specifically, the Defence asserts:

- xx. Paragraph 57 of the Pre-Trial Brief does not support Paragraphs 17, 18, 25, 38, or 61-63 of the Indictment;⁴⁶

³⁸ Second Motion, paras. 35-43.

³⁹ Second Motion, paras. 46-67.

⁴⁰ Second Motion, paras. 68-83.

⁴¹ Second Motion, paras. 84-87.

⁴² Second Motion, paras. 88-90.

⁴³ Second Motion, paras. 91-93.

⁴⁴ Second Motion, para. 95.

⁴⁵ Second Motion, paras. 97-99.

⁴⁶ Second Motion, paras. 100-105.

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- xxi. Paragraph 58 of the Pre-Trial Brief does not support Paragraphs 17, 18, 25, 42, 51, 52, 60, or 61-63 of the Indictment;⁴⁷
- xxii. Paragraph 59 of the Pre-Trial Brief does not support Paragraphs 17, 18, 25, 26, 42, 43, 51, 52, 60, or 61-63 of the Indictment;⁴⁸
- xxiii. Paragraph 60 of the Pre-Trial Brief does not support Paragraphs 17, 18, 25, 26, 38, 42, 43, 51, 52, 60, or 61-63 of the Indictment;⁴⁹
- xxiv. Paragraph 61 of the Pre-Trial Brief does not support Paragraphs 17, 18, or 61-63 of the Indictment.⁵⁰

20. The Defence avers that the Prosecution failed to clarify whether the allegations contained in paragraphs 54-55 and 77 of the Pre-Trial Brief, describing a meeting at Kanyabuhombo School, refers to one meeting or multiple meetings, despite the Trial Chamber's direction to do so.⁵¹

21. For the foregoing reasons, the Defence requests this Chamber to order the Prosecutor to file a new list of exhibits correctly indicating which Exhibits support which paragraphs of the Indictment; file a new table correctly and precisely indicating which paragraphs of the Pre-Trial Brief support which paragraphs of the Indictment; and exclude the allegations in Paragraphs 54, 55, and 77 of the Pre-Trial Brief, as the factual underpinnings of those allegations remain ambiguous even after this Chamber's order directing that they be clarified.⁵²

Response to the Second Motion

22. The Prosecution requests that the Second Motion also be dismissed in its entirety.⁵³

23. The Prosecution avers that this Chamber deemed challenges to its exhibit list and witness list moot, and so the Defence is wasting time attempting to re-litigate those issues.⁵⁴

24. The Prosecution further asserts that the relevance of the contested paragraphs of the Pre-Trial Brief to the specified paragraphs of the indictment is "clearly establish[ed]" by reading the Pre-Trial Brief in the context of its clarifications, annexes, and addenda.⁵⁵

⁴⁷ Second Motion, paras. 106-112.

⁴⁸ Second Motion, paras. 113-120.

⁴⁹ Second Motion, paras. 121-128.

⁵⁰ Second Motion, paras. 129-134.

⁵¹ Second Motion, paras. 135-140; *see* 2 June Decision, para. 46.

⁵² Second Motion, para. 141.

⁵³ Response to the Second Motion, para. 11.

⁵⁴ Response to the Second Motion, para. 7 (citing Decision on Trial Date, 12 June 2009, para. 51) ("Trial Date Decision").

⁵⁵ Response to the Second Motion, para. 9.



25. The Prosecution contends that, as a general rule, the appropriate forum to challenge the sufficiency of the Prosecution's evidence to support the allegations in the indictment is trial, rather than motions objecting to the Pre-Trial Brief.⁵⁶

Reply to the Response to the Second Motion

26. The Defence rejects the Prosecutor's contention that its objections to the exhibit list are now moot based on the Trial Date Decision, pointing out that the Chamber has not before considered objections to an exhibit list which met the specifications set out by the chamber in the 20 April Interoffice Memorandum.⁵⁷

27. The Defence again asserts that it is not engaged in a trial by pleadings.⁵⁸

28. The Defence next argues that it is not challenging the sufficiency of the Prosecutor's evidence to support particular assertions, but the accuracy of data provided by the Prosecutor in response to an order by the Chamber.⁵⁹

29. The Defence rejects the Prosecutor's contention that the clarifications "clearly establish" the relevance of the challenged paragraphs, and reiterates its objections *in toto*.⁶⁰

DELIBERATIONS

30. The Chamber notes that the Defence is challenging the information accompanying the Prosecution's witness and exhibit lists. The Chamber recalls that Rule 73 *bis*, which governs such information, implements the right of the Accused to be informed in detail of the nature and cause of the charges against him, which is guaranteed in Article 20 (4) (a) of the Statute."⁶¹ In determining whether the Prosecutor has complied with Rule 73 *bis*, the Chamber considers whether the Accused has been "properly inform[ed] . . . of the anticipated evidence relating to specific allegations."⁶²

31. The Chamber further notes that the function of a Pre-Trial Brief is to "address[] the factual and legal issues" in a particular case.⁶³ In doing so, the Pre-Trial Brief should

⁵⁶ Response to the Second Motion, para. 10 (citing *Prosecutor v. Halilović*, IT-01-48-T, Decision on Defence Motion for Striking Out of Paragraphs in the Prosecution's Pre-Trial Brief, 7 February 2005).

⁵⁷ Reply to the Response to the Second Motion, para. 9.

⁵⁸ Reply to the Response to the Second Motion, para. 16.

⁵⁹ Reply to the Response to the Second Motion, para. 17.

⁶⁰ Reply to the Response to the Second Motion, paras. 20-21.

⁶¹ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecution's Pre-Trial Brief and On the Prosecutor's Counter-Motion, 23 May 2002, para. 12.

⁶² *Id.*, para. 12.

⁶³ Rule 73 *bis* (B) (i).

“clarify the Prosecution case.”⁶⁴ The Brief is relevant to a case only insofar “as it develops [the Prosecution’s] strategy in accordance with the Indictment.”⁶⁵

32. With those principles in mind, the Chamber considers the Parties’ submissions.

The Prosecution Investigator

33. The Defence raises two objections relating to the Prosecution Investigator. First, the Defence argues that the Prosecution added the Investigator as a witness without seeking leave to do so from this Chamber, in violation of Rule 73 *bis* (E). Second, the Defence asserts that the Prosecution failed to identify which paragraphs of the Indictment the Investigator’s testimony will support, in violation of Rule 73 *bis* (B) (iv) (c). The Prosecution argues it was not in violation of Rule 73 *bis* (E), and that the Investigator is not a factual witness.

34. With respect to the allegation that the Prosecution failed to fulfil its Rule 73 *bis* (E) obligations insofar as it added the Investigator as a witness without leave, the Chamber has already determined, in its 12 June Decision, that the Prosecution must seek leave to amend the witness list only after the commencement of trial.⁶⁶ Therefore, this submission is rejected.

35. With respect to the allegation that the Prosecution failed to identify which paragraphs of the Indictment the Investigator’s testimony will support, the Chamber notes the Prosecution’s submission that the Investigator “is not a factual witness,” and “will not add any fact to the allegations against the Accused.”⁶⁷ The Chamber notes that the Investigator is not an expert witness, and that his testimony will relate to facts at issue in the case. Thus, the Investigator is considered as a factual witness. Moreover, the relevant Rule does not restrict its scope to factual witnesses. Rather, that Rule directs that the Prosecution must specify “[t]he points in the indictment on which each witness will testify.”⁶⁸ The Chamber considers that the Rule does not merely protect the right of an Accused to be informed of the nature and cause of the charges against him, but permits the Defence to have adequate time and facilities for preparation,⁶⁹ inasmuch as knowledge of the areas about which a witness will testify is necessary in order to adequately prepare for cross-examination.⁷⁰ Accordingly, the Chamber directs the Prosecution to specify which paragraphs of the Indictment the Investigator’s evidence will support within five days.

⁶⁴ 2 June Decision, para. 31.

⁶⁵ *Id.* (citing *The Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-PT, Decision on Defence Motion to Exclude some Parts of the Prosecution Pre-Trial Brief, 30 September 2005, para. 2).

⁶⁶ See Trial Date Decision, para. 55; Rule 73 *bis* (E).

⁶⁷ Response to the First Motion, para. 33.

⁶⁸ Rule 73 *bis* (B) (iv) (c).

⁶⁹ Statute, Article 20 (4) (b).

⁷⁰ See *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Bicamumpaka and Mugenzi’s Motion for Specificity in the Pre-Trial Brief, para. 30.

The Prosecution's Witness Grid

36. The Chamber recalls that the Defence raises numerous objections to the Prosecution's witness grid. As regards witnesses ANAD, ANAE, ANAG, ANAJ, ANAK, ANAL, ANAM, ANAN, ANAO, and ANAP, the Defence argues that the Prosecution's witness grid connects each witness to paragraphs of the Indictment which are not supported by the text of that witness' statement. The Prosecution maintains that any such objections are better raised at trial. The Chamber further recalls that it dismissed general objections to the Prosecution's witness grid as "lack[ing] reference to specific flaws" and thus "unsubstantiated" in its 2 June Decision.⁷¹ As the Defence has now raised specific objections, the Chamber will consider the Defence's submissions.

37. Except for the Prosecution Investigator, discussed above, the Chamber notes that the Defence does not assert that the Prosecution has failed to provide a list of the points in the indictment on which any witness will testify, as required by Rule 73 *bis* (B) (iv) (c). Rather, the Defence contends only that the Prosecution has provided lists which are inaccurate because, in several cases, some of the specified points in the indictment fall outside the scope of the witness' statement. Insofar as the witness grid lays out the Prosecution's strategy by specifying which paragraphs in the Indictment the Prosecution will attempt to support through each witness' testimony, the Chamber considers that the witness grid provides adequate notice. Whether the witness' statements actually support the relevant paragraphs is an issue best considered at trial, in the context of all the evidence. Accordingly, the Defence submissions relevant to the Prosecution's witness grid are denied.

The Prosecution's Exhibit List

38. The Chamber recalls that the Defence avers that numerous exhibits in the Prosecution's list do not support the paragraphs of the Indictment the Prosecution contends they support. The Prosecution argues that the Chamber previously found challenges to its exhibit list "moot," and that the issue has consequently already been adjudicated. Moreover, the Prosecution maintains, an objection asserting an exhibit does not actually support a paragraph of the Indictment is properly considered as a challenge to the sufficiency of the Prosecution's evidence, and so properly addressed at trial.

39. With respect to the Prosecution's argument that this Chamber previously found challenges to the adequacy of its exhibit list "moot," the Prosecution has misstated the Chamber's decision. In issuing the Decision setting a trial date of 12 June, the Chamber dismissed a challenge to the Prosecution's exhibits and exhibit list as moot because "after the filing of the Reply, and upon the Chamber's instructions of 18 May 2009 and 2 June 2009, the Prosecution filed an exhibit list and exhibits in Annex II to its revised Pre-Trial Brief, as well as clarifications."⁷² The Chamber concluded that the Defence's objection to a Prosecution exhibit list which had been superseded by a subsequent exhibit list was moot, because the objection was to an exhibit list which had been revised. The Chamber did not conclude that all objections to any exhibit list were moot. Thus, the Chamber

⁷¹ 2 June Decision, para. 74.

⁷² Trial Date Decision, para. 51 (footnotes omitted).

rejects the Prosecution's argument in this regard, and proceeds to consider the Defence's objections to the Prosecution's revised exhibit list.

40. As in the case of the witness grid, insofar as the exhibit list lays out the Prosecution's trial strategy by specifying which paragraphs of the Indictment the Prosecutor will attempt to support by reference to each Exhibit, the Chamber considers that the exhibit list provides adequate notice to the Defence. Whether the exhibits actually support the stated paragraphs of the Indictment is an issue best considered at trial, in light of all the relevant evidence for both parties. Accordingly, the Defence objections to the Prosecutor's exhibit list are denied.

The Prosecution's Pre-Trial Brief

41. The Defence objects to two portions of the Prosecution's Pre-Trial Brief itself, alleging each is ambiguous. First, the Defence asserts that it is not clear whether paragraphs 57 through 61 of the Pre-Trial Brief support paragraph 27 or Paragraph 50 of the Indictment. The Defence alleges that the list of paragraphs offered by the Prosecution in response to this concern is unjustified. Second, the Defence argues that, despite the Chamber's order accompanying the 2 June Decision, the Prosecutor has not clarified whether paragraphs 54-55 and 77 of the Pre-Trial Brief refer to one meeting at Kanyabuhumbo School or multiple meetings.

42. Concerning the Defence allegation that the Prosecution has not clarified whether paragraphs 57 through 61 of the Pre-Trial Brief support paragraph 27 or paragraph 50 of the Indictment, the Chamber notes that it ordered the Prosecution to "clarify to which allegation in the Amended Indictment the material facts detailed in paragraphs 57 to 61 of the Prosecution Pre-Trial Brief refer" in its 2 June Decision.

43. The Trial Chamber further notes that those paragraphs describe a meeting at Petit Bruxelles "a few days after [President Habyarimana's] death" between the Accused, Faustin Bagango, and other *Interahamwe* at which the Accused allegedly provided machetes to Bagango and another *Interahamwe* leader and told Bagango "not a single Tutsi should survive." Paragraph 27 of the Indictment asserts that the Accused ordered Bagango to distribute machetes to *Interahamwe* members, which were later used to kill Tutsis in the service of a plan to eliminate the Tutsis in that region in whole or in part. Paragraph 50 of the Indictment asserts that the Accused provided machetes to Bagango, which Bagango and the *Interahamwe* then used to exterminate Tutsi civilians in the Nyamyumba commune.

44. The Chamber observes that in the Prosecution's Clarifications, the Prosecution attached a grid averring that the relevant paragraphs of the Pre-Trial Brief support several different paragraphs of the Indictment, including paragraphs 27 and 50. The Chamber considers that, in doing so, the Prosecution satisfied the Chamber's order to "clarify to which allegation ... the material facts detailed in paragraphs 57 to 61 of the Prosecution Pre-Trial Brief refer." Accordingly, the Chamber denies this submission.

45. Concerning the Defence objection regarding the meeting or meetings at Kanyabuhombo School referenced in paragraphs 54-55 and 77, the Chamber considers that it previously ordered the Prosecution to clarify whether those paragraphs refer to one meeting at Kanyabuhombo School or multiple meetings.⁷³ The Chamber does not consider the Prosecution's clarification that the relevant witness statements are ambiguous to have, in fact, provided any additional clarity.

46. However, the Chamber notes that the Defence assertion that the Accused is "indubitably prejudiced" by the Prosecution's inability to clarify the relevant paragraphs is not substantiated.⁷⁴ Moreover, the Chamber considers that any ambiguity as to whether the Accused participated in one meeting at Kanyabuhombo School or multiple meetings at that location will not prejudice the Defence in its ability to prepare for trial, because the location of the meeting or meetings and the substance of the discussions are unambiguous and clearly identified in the Pre-Trial Brief.⁷⁵ Accordingly, the Chamber rejects this submission.⁷⁶

Discrepancies Between the Order of Appearance and the Summary

47. The Defence raises two objections based on discrepancies between the Prosecution's Order of Appearance and the Prosecution's Summary. First, the Defence contends that Witness ANAH is listed in the Order of Appearance, but not the Summary, and it is consequently unclear whether that witness will be called to testify. Second, the Defence observes that the Order of Appearance estimates that the Prosecution's case will require three weeks, while the Summary estimates that the Prosecution's case will require two weeks. In each case, the Defence requests that the Chamber order the Prosecutor to resolve the alleged inconsistency.

48. The Chamber considers that the Prosecution has eliminated any discrepancy regarding Witness ANAH by clarifying that the witness will not testify.⁷⁷ The Chamber further considers that the Prosecution provided estimates of the length of testimony for each witness, and of the Prosecution case in its entirety, in response to the Chamber's Interoffice Memorandum of 20 April. The Prosecution was only thereby ordered to provide estimates of length, and is in no way obligated to inform the Defence of the length of its case to a mathematical certainty.⁷⁸ Moreover, the Defence has not alleged, much less substantiated, that it will be prejudiced by any uncertainty as to whether the Prosecution's case will take two or three weeks to present. Accordingly, this submission is denied.

⁷³ 2 June Decision, para. 46.

⁷⁴ Second Motion, para. 139.

⁷⁵ See Pre-Trial Brief, paras. 54, 55, 77.

⁷⁶ See Rule 5(B).

⁷⁷ Response to the First Motion, para. 35.

⁷⁸ See Rule 73 bis (B) (iv) (d) requiring the Prosecutor to provide the Defence "the estimated length of time required for each witness" along with the Prosecution's witness list.



FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the First Motion in part;

ORDERS the Prosecution to supplement its witness grid by specifying to which points in the Indictment the Investigator's evidence will refer within five days

DENIES the First Motion in all other respects.

DENIES the Second Motion in its entirety.

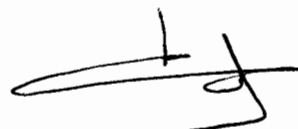


Arusha, 25 June 2009

William H. Sekule
Presiding Judge



Solomy Balungi Bossa
Judge



Mparany Rajohnson
Judge

[Seal of the Tribunal]

