

ICTR-02-78-T
15-01-2010
(5243 - 5232)

5243
Mwamp



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER II

Before Judges: Taghrid Hikmet, Presiding
Seon Ki Park
Joseph Masanhe

Registrar: Adama Dieng

Date: 15 January 2010

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

JUDICIAL INVESTIGATION DIVISION
2010 JAN 15 P 1:22
CHIVES

**DECISION ON DEFENCE MOTION FOR A STAY OF THE PROCEEDINGS OR
EXCLUSION OF EVIDENCE OUTSIDE THE SCOPE OF THE INDICTMENT**

Office of the Prosecutor:
Holo Makwaia
Althea Alexis Windsor
Cheikh Tidiane Mara
Lansana Dumbuya

Defence Counsel:
David Jacobs
Claver Sindayigaya
Marc Nerenberg

INTRODUCTION

1. The Accused, Gaspard Kanyarukiga, was indicted on charges of genocide, complicity in genocide, conspiracy to commit genocide and extermination as a crime against humanity on 21 February 2002.¹ The Indictment was confirmed on 4 March 2002 ("Original Indictment").²
2. On 14 November 2007, the Prosecution filed an Amended Indictment charging the Accused with genocide, complicity in genocide and extermination as a crime against humanity ("Amended Indictment").³
3. The trial in this case commenced on 31 August 2009. After calling eleven witnesses over fourteen trial days, the Prosecution closed its case on 17 September 2009. The Defence is scheduled to present its case between 18 January and 12 February 2010.⁴
4. On 18 December 2009, the Defence filed a motion for a stay of the proceedings or exclusion of evidence.⁵ The Defence submits that, during the presentation of its case, the Prosecution led evidence outside the scope of the Amended Indictment, including evidence of allegations contained in the Original Indictment but removed from the Amended Indictment.⁶ The Defence contends that the prosecution of this case has been irreparably damaged by the admission of this evidence and that the appropriate remedy is a stay of the proceedings and liberation of the Accused.⁷ Alternatively, the Defence requests that the Trial Chamber exclude all evidence led by the Prosecution that is outside the scope of the Amended Indictment.⁸
5. On 22 December 2009, the Prosecution filed a response to the Defence motion, arguing that it has provided adequate notice of the charges against the Accused and that the Accused was fully aware of the Prosecution's case prior to the commencement of trial.⁹ The Prosecution further submits that the Trial Chamber has already dealt with "virtually all of the points" raised in the Defence motion.¹⁰
6. On 29 December 2009, the Defence filed a reply, arguing that the Prosecution's submissions are unresponsive to the Defence motion and are without merit.¹¹

¹ Original Indictment, filed 21 February 2002.

² Decision on the Prosecutor's *Ex Parte* Motion for Review and Confirmation of the Indictment and Other Related Orders (TC), 4 March 2002.

³ Amended Indictment, filed 14 November 2007.

⁴ Scheduling Order Following the Status Conference Held on 17 September 2009 (TC), 28 September 2009, Order I.

⁵ Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Indictment, filed on 18 December 2009 ("Defence Motion").

⁶ Defence Motion, paras. 75-76.

⁷ Defence Motion, paras. 2-3.

⁸ Defence Motion, para. 3.

⁹ Prosecutor's Reply to Defence "Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Indictment," filed on 22 December 2009 ("Prosecutor's Response").

¹⁰ Prosecutor's Response, para. 2.

¹¹ Reply to "Prosecutor's Reply to Defence 'Motion for a Stay of Proceedings, or Exclusion of Evidence Outside the Indictment,'" filed on 29 December 2009.

DELIBERATIONS

A) Request for Stay of Proceedings

7. The Chamber recalls its discussion of the jurisprudence relating to stays of proceedings from its decision of 28 August 2009:

11. Articles 19(1) and 20 of the Statute of the International Criminal Tribunal for Rwanda ("the Statute") guarantee the Accused the right to a fair and expeditious trial. As elaborated by the Trial Chamber in the *Media* case, Article 19 (1) of the Statute mirrors the corresponding guarantee provided for in international and regional human rights instruments, including the International Covenant on Civil and Political Rights (1966) ("ICCPR"), the European Convention on Human Rights (1950), and the American Convention on Human Rights (1969).

12. Concerning stays of proceedings, the Appeals Chamber held the following in *Barayagwiza*:

Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

13. The abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.

14. If an accused claims that an abuse of process has occurred, it is important that he show that he has suffered prejudice. The burden of showing that there has been an abuse of process rests with the accused, and establishing such abuse will depend on the circumstances of the case.¹²

8. In this case the Defence argues that, due to the Prosecution leading "another case in evidence, than the case charged," it is "impossible to fully undo the damage that has been done to the rights of the Accused".¹³ Furthermore, the Defence argues that "the prosecution of this case has been irreparably damaged by the fact that the Prosecution has lead [*sic*] a case that he had previously purported to have abandoned."¹⁴ The Defence

¹² Decision on the Extremely Urgent Defence Motion for a Stay of Proceedings (TC), 28 August 2009, paras. 11-14 (footnotes omitted).

¹³ Defence Motion, para. 1.

¹⁴ Defence Motion, para. 2.



argues that this is largely due to the Prosecution removing facts from the Indictment when it was amended on 14 November 2007 and then reintroducing those facts into evidence during the Prosecution case.¹⁵

9. The Chamber recalls that a stay of proceedings may be granted where delay has made a fair trial impossible or where, due to pre-trial impropriety or misconduct, proceeding with the trial would contravene the court's sense of justice.¹⁶ The Defence request in this case is not based on either delay or pre-trial misconduct. Rather, the Defence argues that the Prosecution led evidence at trial that was outside the scope of the Amended Indictment. The Chamber does not consider the introduction of this evidence to warrant a stay of the proceedings, particularly given that any prejudice to the Accused may be remedied through the exclusion of the impugned evidence. Indeed, the Chamber notes that a stay of proceedings is an extreme measure, which should only be invoked as a last resort. As such, the Chamber considers the Defence request for a stay of proceedings in this case to be without merit. The Chamber therefore denies the Defence request.

B) Request for Exclusion of Evidence

10. The Defence requests exclusion of several pieces of evidence on the basis that they are outside the scope of the Amended Indictment.

1) Applicable Law

11. Article 20(4)(a) of the ICTR Statute guarantees an accused the fundamental right "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her[.]" The Appeals Chamber has interpreted this provision, in conjunction with Articles 17(4), 20(2), and 20(4)(b) of the Statute and Rule 47(C) of the Rules of Procedure and Evidence, as requiring the Prosecution to plead all material facts underpinning the charges in an indictment but not the evidence by which those material facts will be proved.¹⁷ As explained by the Appeals Chamber in *Muvunyi*:

Defects in an indictment may come to light during the proceedings because the evidence turns out differently than expected; this calls for the Trial Chamber to consider whether a fair trial requires an amendment of the indictment, an adjournment of proceedings, or the exclusion of evidence outside the scope of the indictment.¹⁸

12. In some cases, defects in an indictment may be "cured" through the provision of "timely, clear and consistent information" detailing the factual basis underpinning the

¹⁵ Defence Motion, Part X.

¹⁶ See Decision on the Extremely Urgent Defence Motion for a Stay of Proceedings (TC), para. 13.

¹⁷ *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 21; *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10A and ICTR-96-17A, Judgement (AC), 13 December 2004, para. 470. See also *Prosecutor v. Simic*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 20; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006, para. 23; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 88.

¹⁸ *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2009, para. 18; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 27. See also *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 92.

charges in question.¹⁹ However, only material facts that are reasonably related to existing charges may be communicated in this manner. The Prosecution may not use its subsequent submissions to expand charges specifically pleaded in the indictment or introduce additional allegations.²⁰ The Appeals Chamber has found that material facts that concern an accused's personal actions should be specifically and clearly pleaded in the indictment and will be scrutinised more closely than other allegations of criminal conduct.²¹

13. In assessing whether a defective indictment has been cured, the Chamber shall consider whether the accused was in a reasonable position to understand the charges against him or herself.²² In making this determination, contrary to the Defence's submissions, the Appeals Chamber has occasionally looked to information provided through the Prosecution's pre-trial brief or its opening statement.²³ On the other hand, mere service of witness statements or potential exhibits pursuant to disclosure requirements will not suffice to inform an accused of the material facts that the Prosecution intends to prove at trial.²⁴

14. An objection during trial is an important tool to ensure that the trial is conducted on the basis of evidence that is relevant to the charges against the accused.²⁵ The objection must be specific to the evidence being adduced and must be timely. This normally requires that an objection be made at the time that the impugned evidence is introduced. In some cases, however, an objection is not raised immediately after the introduction of the impugned evidence. In this situation, the Chamber must consider whether the burden of proof has shifted from the Prosecution to the Defence.²⁶ When determining this, the Appeals Chamber has found that factors, including whether the Defence has provided a reasonable explanation as to its failure to raise the objection at

¹⁹ *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Judgement (AC), 2 February 2009, para. 293; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2009, para. 20. See also *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, paras. 28, 65; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 114.

²⁰ *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Judgement (AC), 2 February 2009, para. 293; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 32.

²¹ *Prosecutor v. Bagosora et al.*, Case No. ICTR-96-7-T, Decision on Aloys Ntabakuze's Interlocutory Appeals on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence (AC), 18 September 2006 ("Bagosora Appeals Chamber Decision"), para. 33, cited in *Prosecutor v. Bagosora et al.*, Case No. ICTR-96-7-T Decision on Bagosora Motion for Exclusion of Evidence outside the Scope of the Indictment (TC), 11 May 2007, para. 39.

²² *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006, para. 27; *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 303.

²³ *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10A and ICTR-96-17A, Judgement (AC), 13 December 2004, para. 27; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006, para. 27; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 117. See also *Prosecutor v. Simic*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 24.

²⁴ *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10A and ICTR-96-17A, Judgement (AC), 13 December 2004, para. 27. See also *Prosecutor v. Simic*, Case No. IT-95-9-A, Judgement (AC), 28 November 2006, para. 24; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006, para. 27.

²⁵ *Prosecutor v. Bagosora et al.*, Case No. ICTR-96-7-T Decision on Bagosora Motion for Exclusion of Evidence outside the Scope of the Indictment (TC), 11 May 2007, para. 8.

²⁶ Bagosora Appeals Chamber Decision, para. 45.

the time and whether the objection was raised as soon as possible after the introduction of the relevant evidence, should be considered.²⁷ If the objection is raised later at a later stage in the trial, this will not automatically lead to a shift in the burden of proof.²⁸

2) *Specific Evidence Requested to be Excluded*

a) *Evidence regarding meetings*

15. The Defence requests that the following allegations regarding meetings in or around the Nyange Parish be excluded:

- (i) Witness CBK's evidence that the Accused attended a meeting on 13 April 1994;²⁹
- (ii) Witness CBR's evidence that the Accused attended a meeting on 13 April 1994 at the communal office;³⁰
- (iii) Witness CDL's evidence that the Accused attended a meeting at the communal office on 13 April 1994;³¹
- (iv) Witness CBN's evidence that the Accused attended a meeting on 14 April 1994;³²
- (v) Witness CBS's evidence that the Accused attended a meeting on 14 April 1994;³³
- (vi) Witness CBR's evidence that the Accused attended a meeting at the cooperative (CODEKOKI) on 15 April 1994;³⁴
- (vii) Witness CDK's evidence that the Accused attended a meeting at the cooperative (CODEKOKI) on 15 April 1994;³⁵ and
- (viii) Witness CDL's evidence that the Accused participated in a meeting in front of the pharmacy on 16 April 1994.³⁶

²⁷ *Ibid.*

²⁸ Bagosora Appeals Chamber Decision, para. 46.

²⁹ Defence Motion, p. 26, Allegation No. 3, T. 2 September 2009, pp. 70-71. The witness gave evidence from 2 September 2009 to 4 September 2009.

³⁰ Defence Motion, p. 27, Allegation No. 5, T. 9 September 2009, p. 7. The witness gave evidence from 9 September 2009 to 10 September 2009.

³¹ Defence Motion, p. 27, Allegation No. 6, T. 10 September 2009, pp. 46-47. The witness gave evidence from 10 September 2009 to 11 September 2009.

³² Defence Motion, p. 27, Allegation No. 8, T. 1 September 2009, p. 56. The witness gave evidence from 1 September 2009 to 2 September 2009.

³³ Defence Motion, p. 28, Request No. 11, T. 16 September 2009, pp. 50-51. The witness gave evidence from 16 September 2009 to 17 September 2009.

³⁴ Defence Motion, p. 28, Request No. 12, T. 9 September 2009, p. 18. The witness gave evidence from 9 September 2009 to 10 September 2009.

³⁵ Defence Motion, p. 28, Request No. 13, T. 16 September 2009, p. 3. The witness gave evidence on 16 September 2009.

³⁶ Defence Motion, p. 28, Request No. 16, T. 10 September 2009, p. 37. The witness gave evidence from 10 September 2009 to 11 September 2009.

16. The Chamber notes that, by objecting at the time that this evidence was adduced, the Defence made a timely objection to the introduction of this evidence.³⁷ Thus, the burden of proof remains with the Prosecution.

17. The Amended Indictment, at paragraphs 11, 12, 16 and 17, alleges that the Accused took part in meetings at the Nyange church on 10, 12, 15 and 16 April 1994. In addition, the Prosecutor's Pre-Trial Brief stipulates that the Accused and others took part in meetings "from 10 April 1994 [...] and continued throughout the period until 16 April 1994" in relation to the charge of genocide.³⁸ The Chamber notes that Prosecution witnesses testified to various dates with regard to meetings allegedly attended by the Accused. The Chamber further notes that the Amended Indictment does not specifically list each meeting detailed by these witnesses ((i) to (viii) above). The Chamber, however, finds that a close analysis of the evidence on the meetings allegedly attended by the Accused would draw it into a substantive evaluation of the quality of much of the Prosecution evidence, which, at this stage of the proceedings, is neither warranted nor appropriate. The Chamber will consider the evidence in detail in its judgement and will reserve any ruling until then.

b) Witness CDL's evidence regarding the killing of Muhigirwa on 9 April 1994

18. Prosecution Witness CDL testified that Muhigirwa was attacked and killed on the night of 9 April 1994 by "assailants."³⁹ The Chamber finds that the Defence made a timely objection to the introduction of this evidence by the Prosecution.⁴⁰

19. Paragraph 9 of the Amended Indictment alleges that Tutsi civilians were attacked in their homes following the death of the Rwandan President on 6 April 1994 and that, as a result, some were killed.⁴¹ The killing of Muhigirwa falls within paragraph 9 of the Amended Indictment as this person was a Tutsi civilian who was killed after the death of the Rwandan President on 6 April 1994. In these circumstances, the notice provided was sufficient.

c) Evidence regarding roadblocks

20. The Defence seeks to exclude the following:

- (i) Prosecution Witness CBN's testimony that Kanyarukiga arrived at a roadblock opposite the Nyange church on the morning of 13 April 1994 and greeted the *gendarmes* who were manning the roadblock,⁴² and

³⁷ (i) at T. 2 September 2009, pp. 71-73, (ii) at T. 9 September 2009, pp. 7-9, (iii) at T. 10 September 2009, p. 47, (iv) at T. 1 September 2009, p. 59, (v) at T. 16 September 2009, p. 50, (vi) at T. 9 September 2009, p. 20, (vii) at T. 16 September 2009, p. 4 and (viii) at T. 10 September 2009, p. 37.

³⁸ Prosecutor's Pre-Trial Brief, para. 36.

³⁹ Defence Motion, p. 26, Request No. 1, T. 10 September 2009, pp. 23-24. The witness gave evidence from 10 September 2009 to 11 September 2009.

⁴⁰ T. 10 September 2009, p. 24.

⁴¹ Amended Indictment, para 9.

⁴² Defence Motion, p. 26, Request No. 2, T. 1 September 2009, p. 50. The witness testified from 1 September 2009 to 2 September 2009.

- (ii) Prosecution Witness CBN’s testimony concerning Kanyarukiga’s attendance at a roadblock that was manned by *gendarmes* on the morning of 14 April 1994.⁴³

21. The Chamber finds that the Defence made a timely objection to the introduction of this evidence by the Prosecution.⁴⁴

22. The Chamber notes that the Amended Indictment makes no reference to Kanyarukiga being at a roadblock on 13 April 1994 and 14 April 1994. Furthermore, the Prosecution has failed to point to any references in the Pre-Trial Brief or the opening statement concerning these events. The Chamber notes that the Prosecution has adduced evidence to suggest that the purpose of roadblocks, at the time of the events in question, was to prevent Tutsi, who were taking refuge in the church, from fleeing. In light of this evidence, Kanyarukiga’s alleged presence at a roadblock on 13 April 1994 and 14 April 1994 could be incriminating. Since adequate notice of these events was not given to the Accused, the Chamber excludes these two pieces of evidence.

d) Witness CBK’s evidence that the Accused was involved in disarming those seeking refuge in the Nyange church on 13 April 1994

23. Witness CBK testified that Kanyarukiga was involved in disarming those seeking refuge in the Nyange church on 13 April 1994.⁴⁵ The Defence made a contemporaneous objection to the introduction of this evidence.⁴⁶

24. The Amended Indictment does not make reference to the disarmament of the Tutsi seeking refuge in the Nyange church. However, the Pre-Trial Brief and the Prosecution’s opening statement refer to this incident.⁴⁷ The Chamber notes that the Pre-Trial Brief was filed on 4 May 2009.⁴⁸ The case against the Accused commenced on 31 August 2009, and Prosecution Witness CBK testified from 2 to 4 September 2009. The Chamber therefore finds that the Accused received timely, clear and consistent notice that this incident would form part of the Prosecution case. Furthermore, the Chamber finds that this evidence is consistent with the general allegation that Kanyarukiga took part in the organisation of and preparation for attacks on the Tutsi seeking refuge at Nyange Parish between 10 and 16 April 1994.⁴⁹ The Chamber is satisfied that the Pre-Trial Brief and the opening statement provided adequate notice to the Accused.

e) Witness CBR’s evidence that the Accused met assailants and made a speech about Mushubati on 14 April 1994

25. Prosecution Witness CBR testified that, on 14 April 1994, the Accused pulled up at the roadside in order to tell a number of *Interahamwe* that *Inyenzi* had reached

⁴³ Defence Motion, p. 27, Request No. 7, T. 1 September 2009, p. 59.
⁴⁴ T. 1 September 2009, pp. 50-51, T. 1 September 2009, p. 59.
⁴⁵ Defence Motion, p. 27, Request No. 4, T. 2 September 2009, p. 70. The witness gave evidence from 2 September 2009 to 4 September 2009.
⁴⁶ T. 2 September 2009, pp. 71-73.
⁴⁷ Pre-Trial Brief, para. 39; T. 31 August 2009, p. 8.
⁴⁸ Prosecutor’s Pre-Trial Brief, filed on 4 May 2009.
⁴⁹ Amended Indictment, paras. 4, 11, 12, 14, 15, 16, 17, 18 and 19.

Mushubati and were intending to move towards the Nyange church.⁵⁰ Upon Witness CBR testifying to this event, the Defence made a timely objection to its introduction.⁵¹

26. The evidence by Witness CBR that Kanyarukiga stopped by the roadside and informed those present at that location about the whereabouts of the *Inyenzi* does not constitute a new allegation or a material fact, of which prior notice should have been given. Thus, there is no reason to exclude this evidence.

f) Witness CDL's evidence that the Accused attended a meeting at Mutanoga Centre on 14 April 1994, carrying a pistol in his belt

27. Witness CDL testified that the Accused attended a meeting at the Mutanoga Centre on 14 April 1994, carrying a pistol in his belt.⁵² The Chamber notes that the Defence objected shortly after this evidence was adduced.⁵³

28. The Chamber notes that the evidence that the Accused was carrying a pistol in his belt is a detail incidental to the allegation of Kanyarukiga attending a meeting. As mentioned above, the Chamber will consider the evidence concerning the meetings in its judgement.

g) Witness CNJ's evidence that the Accused went to get a Caterpillar with an Interahamwe

29. Prosecution Witness CNJ testified that the Accused accompanied an *Interahamwe* to obtain a Caterpillar (bulldozer) to be used at the Nyange church.⁵⁴ The Defence made a contemporaneous objection to this evidence.⁵⁵

30. The Chamber notes that the Amended Indictment makes no reference to this incident. Further, neither the Prosecution Pre-Trial Brief nor the opening statement provide any details of this alleged incident. Since insufficient notice was provided, the Chamber excludes Prosecution Witness CNJ's evidence that the Accused accompanied an *Interahamwe* to obtain a Caterpillar (bulldozer) to be used at the Nyange church.

h) Witness CNJ's evidence that medical treatment for assailants was dispensed at the Accused's pharmacy

31. Prosecution Witness CNJ testified that medical treatment was provided to assailants at the Accused's pharmacy.⁵⁶ The Chamber finds that the Defence objected in a timely manner to Witness CNJ's testimony.⁵⁷

⁵⁰ Defence Motion, p. 27, Request No. 9, T. 9 September 2009, p.12. The witness gave evidence from 9 September 2009 to 10 September 2009.

⁵¹ T. 9 September 2009, pp. 12-13.

⁵² Defence Motion, p. 27, Request No. 10, T. 10 September 2009, pp. 27-28. The witness gave evidence from 10 September 2009 to 11 September 2009.

⁵³ T. 10 September 2009, p. 28.

⁵⁴ Defence Motion, p. 28, Request No. 14, T. 7 September 2009, pp. 19-20. The witness gave evidence from 7 September 2009 to 8 September 2009.

⁵⁵ T. 7 September 2009, p. 20

⁵⁶ Defence Motion, p. 28, Request No. 15, T. 7 September 2009, p. 13. The witness gave evidence from 7 September 2009 to 8 September 2009.

⁵⁷ T. 7 September 2009, pp. 13-14.

32. The Chamber notes that paragraph 15 of the Amended Indictment refers to Kanyarukiga aiding and abetting the attackers by providing them with weapons and gasoline. However, there is no specific allegation that medical treatment was provided to the Hutu attackers at Kanyarukiga's pharmacy. The Chamber recalls that a defective indictment may be cured through timely, clear and consistent notice of the material facts underpinning the charges. The Chamber notes that this incident was referred to in Witness CNJ's 2002 witness statement.⁵⁸ The Chamber further notes that the Prosecution made reference to this incident in its opening statement.⁵⁹ The Chamber finds that the Prosecution's communication of this information through the witness statement and the opening statement did provide the Accused with sufficient notice so as to allow him to adequately prepare his defence. The Chamber therefore denies the Defence request.

i) *Witness YAU's evidence regarding the alleged arrival at Nyange of Father Kayiranga on a bus, with Interahamwe and gendarmes and a subsequent alleged meeting with Father Kayiranga allegedly attended by the Accused*

33. Prosecution Witness YAU testified that Father Kayiranga arrived at the Nyange Parish on a bus with *Interahamwe* and *gendarmes* and subsequently attended a meeting with the Accused.⁶⁰ The Chamber notes that the Defence failed to make a contemporaneous objection to the introduction of evidence regarding the arrival of Father Kayiranga and a subsequent meeting allegedly attended by the Accused. The Defence objected at the time on the basis that the Prosecutor was leading the witness.⁶¹

34. The Chamber is required to consider whether an objection at this stage of the proceedings, via a Defence motion, is so untimely so as to shift the burden of proof from the Prosecutor to the Defence to show that the Accused's ability to defend himself has been materially impaired. Factors such as whether the Defence has provided a reasonable explanation as to why the objection has been raised at this time and whether the objection was raised as soon as possible thereafter are appropriate for the Chamber to consider here. The Defence argues that, at the time that this evidence was adduced, the purpose for its introduction was not clear, but that it is now clear that this evidence was meant to reintroduce allegations that were removed from the Original Indictment.⁶²

35. The Chamber recalls that during the Prosecution case, it noted that the Defence could make submissions at a later stage of the trial with regard to exclusion of evidence (although in the context of another piece of evidence).⁶³ The Chamber finds that the Defence objection at this point, shortly before the commencement of the Defence case, is sufficiently timely.

36. Witness YAU's evidence regarding the arrival at Nyange of Father Kayiranga on a bus with *Interahamwe* and *gendarmes* is not specifically outlined in the Amended Indictment or the Prosecutor's Pre-Trial Brief. The Chamber notes, however, that this

⁵⁸ Witness CNJ Witness Statement, 26, 27 August 2002, p. 3.

⁵⁹ T. 31 August 2009, p. 9.

⁶⁰ Defence Motion, p. 28, Request No. 17, T. 15 September 2009, pp. 16, 18. The witness gave evidence on 15 September 2009.

⁶¹ T. 15 September 2009, p. 17.

⁶² Defence Motion, paras. 71-72.

⁶³ T. 2 September 2009, p. 74.

fact was included in the Original Indictment.⁶⁴ It is apparent that the Prosecution has been inconsistent in its treatment of this fact; however, it is not a fact that is material. Rather, this fact is incidental to the material fact that more attackers arrived at the Nyange church to continue the attack on the Tutsi taking refuge.⁶⁵ The Chamber finds that this fact, although not specifically mentioned, falls within the material facts pleaded in paragraphs 13 to 15 of the Amended Indictment. The Chamber therefore finds that sufficient notice has been provided.

37. With respect to the evidence that the Accused subsequently attended a meeting with Father Kayiranga, the Chamber refers to its reasoning in paragraph 17 above.

j) Witness YAU's evidence regarding the Accused pouring food intended for those seeking refuge in the Nyange church onto the ground

38. Prosecution Witness YAU testified that the Accused threw food brought to those seeking refuge in the Nyange church on the ground.⁶⁶

39. The Chamber notes that the Defence did not make a contemporaneous objection to the introduction of evidence concerning the throwing of food by Kanyarukiga. Earlier in Witness YAU's testimony, however, the Defence objected on the basis of relevance to testimony that the Accused took money for food from the displaced at the church but did not provide them with food.⁶⁷ The Defence argues that this objection is part of the "same transaction" and includes the alleged throwing of food.⁶⁸ For the reasons outlined in paragraph 35, the Chamber finds that the Defence has objected in a timely manner.

40. With respect to the evidence itself, the Chamber finds that this evidence goes to *mens rea* and may assist the Chamber in assessing the Accused's state of mind at the time of the events in question, as outlined in paragraphs 4, 7 and 8 of the Amended Indictment. For these reasons the Chamber denies the Defence request for exclusion of this evidence.

⁶⁴ Original Indictment, paras. 13-14.

⁶⁵ Amended Indictment, para. 15.

⁶⁶ Defence Motion, p. 19, Allegation No. 18, T. 15 September 2009, p. 14. The witness gave evidence on 15 September 2009.

⁶⁷ T. 15 September 2009, p. 12.

⁶⁸ Defence Motion, para. 74.

FOR THESE REASONS, the Chamber

GRANTS the Defence Motion in part;

EXCLUDES the following evidence:

- a) Witness CBN's evidence that the Accused was at a roadblock on 13 and 14 April 1994; and
- b) Witness CNJ's evidence that the Accused went to get a Caterpillar with an *Interahamwe*;

DENIES the remainder of the Motion.

Arusha, 15 January 2010


 Taghrid Hikmet
 Presiding Judge


 Seon Ki Park
 Judge


 Joseph Masanche
 Judge

[Seal of the Tribunal]

