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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

3564
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OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 26 March 2010

THE PROSECUTOR

v.

Jean-Baptiste GATETE

Case No. ICTR-2000-61-T

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**DECISION ON DEFENCE MOTION FOR EXCLUSION OF EVIDENCE AND
DELINEATION OF THE DEFENCE CASE**

Rule 89 (C) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Richard Karegyesa
Adelaide Whest
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For the Accused:

Marie-Pierre Poulain
Kate Gibson

INTRODUCTION

1. The trial in this case commenced on 20 October 2009.¹ The Prosecution closed its case on 16 November 2009 and the Defence case started on 2 March 2010.²
2. By way of Motion filed on 20 January 2010, the Defence seeks to exclude portions of evidence heard during the Prosecution case.³ The impugned evidence consists of (i) evidence alleged to be outside the scope of the Indictment,⁴ and (ii) evidence for which the Defence alleges it had no notice, including evidence of pre-1994 events.⁵
3. The Prosecution filed its Response on 25 January 2010 requesting that the Chamber deny the Defence Motion.⁶ The Defence replied on 1 February 2010.⁷ On 3 February 2010, the Prosecution filed a Further Response to the Defence Motion.⁸ The Defence replied to the Further Response on 8 February 2010.⁹

DISCUSSION

Preliminary Matters

4. The Defence is challenging six portions of evidence adduced by five Prosecution witnesses. In relation to five of the contested portions, it raised objections during the relevant testimonies. The Prosecution submits that the Chamber has already ruled on each of the objections raised in Court and the Defence should therefore have sought leave to appeal pursuant to Rules 73 (B) and (C).¹⁰
5. The Chamber, however, considers that its in-court rulings during the witnesses' testimonies did not foreclose a subsequent written motion.¹¹ These rulings did not address the merits of the Defence submissions now before the Chamber. Following the close of the Prosecution case, the Chamber has a clearer idea of the possible relevance of the challenged evidence. The Chamber will therefore proceed to consider the Defence Motion.

¹ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-PT, Scheduling Order, 30 September 2009.

² Scheduling Order and Order for the Defence to Reduce its List of Witnesses, 2 February 2010.

³ Defence Motion for Exclusion of Evidence and Delineation of the Defence Case, 20 January 2010 ("Defence Motion").

⁴ Defence Motion, paras. 8-16.

⁵ Defence Motion, paras. 17-35.

⁶ Prosecutor's Response to the Defence Motion for Exclusion of Evidence and Delineation of the Defence Case, 25 January 2010 ("Prosecution Response").

⁷ Reply to Prosecution Response to Defence Motion for Exclusion of Evidence and Delineation of the Defence Case, 1 February 2010 ("Defence Reply").

⁸ Prosecutor's Further Response to Defence Motion for Exclusion of Evidence and Delineation of the Defence Case, 3 February 2010.

⁹ Reply to Prosecution Submissions of 3 February 2010, 8 February 2010.

¹⁰ Prosecution Response, paras. 8-9.

¹¹ The Chamber allowed the evidence of the following Witnesses to be heard: Witness BBP who testified about the presence of the Accused at a roadblock in Ndatemwa (T. 20 October 2009, p. 16); Witness AIK who testified to a list of potential victims allegedly drawn by the Accused prior to April 1994 (T. 12 November 2009, pp. 53-54); Witness BBT who testified to pre-1994 events relating to the Accused (T. 10 November 2009, p. 57); Witness BBW who testified on a meeting and weapons distribution in Nyabisindu in which the Accused allegedly participated (T. 13 November 2009, p. 16). See, for example, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 7.



6. With respect to the Defence submissions regarding notice, the Chamber deems it is best placed to evaluate at a later stage of the proceedings whether the Prosecution was required to give notice of particular allegations.¹² The Parties may also address these issues in their closing briefs. The Chamber will nonetheless proceed to consider whether the contested portions of evidence may be admitted pursuant to Rule 89 (C).¹³

Applicable Law

7. Rule 89 (C) of the Rules of Procedure and Evidence (“Rules”) provides that a Chamber “may admit any relevant evidence which it deems to have probative value.” The Chamber therefore has broad discretion when assessing the admissibility of evidence.¹⁴ Once the evidence is admitted, the exact probative weight to be attached to it is to be determined by the Chamber at a later stage when assessing the totality of the evidence.¹⁵

8. While the Prosecution is obliged to provide notice of the material facts underpinning the charges in the indictment,¹⁶ the Appeals Chamber has held that Rule 89 (C) permits a Trial Chamber to admit evidence that may be relevant to proof of an allegation in the indictment, even where it is not possible to convict an accused in respect of that evidence directly, due to lack of notice.¹⁷

9. A Trial Chamber can exclude relevant evidence if it is determined that its probative value is substantially outweighed by the prejudicial effect of admitting it.¹⁸ According to the Tribunal’s jurisprudence, exclusion is a remedy which is at the extreme end of a scale of

¹² *The Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-T, Trial Judgement, 25 February 2010, paras. 26-27, relating to the issues of notice and pre-1994 events; *Bagosora et al.*, Judgement (TC), 18 December 2008, para. 121; *The Prosecutor v. Edouard Karemera et al.*, Case No. 98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing (AC), 11 May 2007, para. 12; *Bagosora et al.*, Decision on Exclusion of Testimony Outside the Scope of the Indictment, 27 September 2005, para. 7; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, paras. 18-19; *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Defence Motion to Strike Testimony of Witnesses GBG and GBV, 20 April 2004, paras. 16, 19.

¹³ See also para. 8 of this Decision.

¹⁴ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Casimir Bizimungu’s Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89 (C)), 2 September 2005 (“*Bizimungu Decision of 2 September 2005*”), para. 10; *The Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness (AC), 21 July 2000 (“*Kordic Appeal Decision*”), para. 20; *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (AC) 4 October 2004, (“*Nyiramasuhuko Appeal Decision of 4 October 2004*”), paras. 6-7.

¹⁵ *Nyiramasuhuko Appeal Decision of 4 October 2004*, para. 6; *Bizimungu Decision of 2 September 2005*, para. 16; *Karemera et al.*, Decision on Defence Oral Motions for Exclusion of Witness XBM’s Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment, 19 October 2006, para. 18. See also *Gatete*, Decision on Defence Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal, 3 November 2009, para. 17.

¹⁶ *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-A, Judgement (AC), 29 August 2008 (“*Muvunyi Judgement (AC)*”), para. 18; *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66A, Judgement (AC), 12 March 2008 (“*Seromba Judgement (AC)*”), para. 27; *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2007 (“*Simba Judgement (AC)*”), para. 63.

¹⁷ *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, 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 QBZ Inadmissible” (AC), 2 July 2004 (“*Nyiramasuhuko Appeal Decision of 2 July 2004*”), paras. 14-15.

¹⁸ *The Prosecutor v. Zoran Kupreskic, Mirijan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic and Vladimir Santic*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 31.

measures available to the Chamber in addressing prejudice caused to an accused in the preparation of his defence.¹⁹

Contested Evidence

a. Gakoni Adventist Orphanage (Witness BBM)

10. Witness BBM testified that he was at the Gakoni Orphanage on 9 April 1994 and saw the Accused in the company of Mwangi, Munyabuhoro and communal police between 2.00 p.m. and 3.00 p.m.²⁰ He testified that, after they forced the door open and entered the Orphanage, the Accused told a woman in the orphanage that they were coming to look for the Tutsis who were inside. When *gendarmes* arrived, the Accused and Mwangi immediately left.²¹

11. The Defence submits that this allegation is not in the Indictment and that it was excluded from the Prosecution Pre-Trial Brief and should thus be excluded due to lack of notice and irrelevance to the charges in the Indictment.²²

12. The Prosecution concedes that the Chamber's Decision of 2 October 2009, concerning defects in its Pre-Trial Brief,²³ held that the allegation of a massacre at Gakoni Orphanage is irrelevant to the charges against the Accused. However, it submits that Witness BBM's testimony that he saw Gatete at the Gakoni Orphanage on 9 April 1994 goes to the identification of the Accused.²⁴ In reply, the Defence states that the Prosecution's line of questioning related to more than the mere identification of the Accused.²⁵

13. The Chamber recalls its Decision of 2 October 2009 which held that "the references to Gakoni in the Indictment do not state the occurrence of an attack in Gakoni in which the Accused participated."²⁶ It further held that the allegation constituted a "new and precise material fact" of which sufficient notice was not provided in the Indictment and found the alleged massacre at Gakoni Orphanage to be irrelevant to the charges against the Accused.²⁷

¹⁹ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR 98-42-T, Decision on Alphonse Nteziryayo's Motion for Exclusion of Evidence, 25 February 2009, para. 26; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness's Testimony; Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua, 20 April 2006, para. 8; *Karemera et al.*, Decision on Prosecutor's Notice of Delay in Filing Expert Report of Professor André Guichaoua; Defence Motion to Exclude the Witness' Testimony; and Trial Chamber's Order to Show Cause (TC), 1 February 2006, para. 11; *Karemera et al.*, Decision on Defence Motions to Exclude Testimony of Professor André Guichaoua (TC), 20 April 2006, para. 8; *Karemera et al.*, Decision on the Defence Oral Motions for Exclusion of XBM's Testimony, for Sanctions against the Prosecution and Exclusion of Evidence outside the Scope of the Indictment (TC), 19 October 2006, para. 6.

²⁰ T. 20 October 2009, pp. 62-63.

²¹ T. 20 October 2009, pp. 63-64.

²² Defence Motion, paras. 8-13. The Defence also raised this objection during the testimony of Witness BBM (T. 20 October 2009, p. 62).

²³ Decision on Defence Motion Raising Defects in the Prosecution Pre-Trial Brief of 19 August 2009, 2 October 2009 ("Decision of 2 October 2009"). See also Defence Motion Raising Defects in the Prosecution Pre-Trial Brief of 19 August 2009, 3 September 2009. The challenged allegation read as follows: "On April 10, 1994, Gatete, *Bourgmestre* Mwangi, the deputy *bourgmestre*, communal policemen, [...], and *Interahamwe* militia attacked the Gakoni Adventist Orphanage."

²⁴ Prosecution Response, para. 17.

²⁵ Defence Reply, para. 19.

²⁶ Decision of 2 October 2009, para. 34.

²⁷ *Ibid.*



14. The Chamber considers that Witness BBM's evidence that the Accused forced open the door of the Gakoni Orphanage and said that they were looking for Tutsis relates to the occurrence of an attack on the Orphanage. Accordingly, the Chamber will exclude that portion of Witness BBM's testimony. However, the Chamber will not exclude the part of his evidence which merely referred to the Accused's presence at Gakoni Orphanage on 9 April 1994, as it is relevant to establishing how many times the Witness saw the Accused in April 1994 and may also be relevant to other charges in the Indictment.²⁸

b. Ndatemwa (Witness BBP)

15. Witness BBP testified that, on 7 April 1994, he saw the Accused at a roadblock manned by *gendarmes* in Ndatemwa *cellule*, in Murambi commune.²⁹

16. The Defence submits that neither the Indictment nor the Pre-Trial Brief refer to any events having taken place in Ndatemwa, and that this portion of Witness BBP's evidence was not mentioned in his written statement or in any will-say statement disclosed by the Prosecution. The Defence therefore requests the Chamber to exclude this evidence so it can limit its case to only those allegations and charges in the Indictment.³⁰

17. The Chamber recalls that Witness BBP gave evidence relating to the roadblock in Ndatemwa following the Prosecution's questions with regard to how many times he saw the Accused in April 1994.³¹ The Witness answered that the first time he saw the Accused was on 7 April 1994 at the Ndatemwa roadblock.³²

18. For the purposes of admission under Rule 89 (C), the Chamber considers that the evidence is sufficiently related to the Indictment, for example, with respect to the Accused's alleged movements around Murambi commune.³³ It is also relevant to showing when Witness BBP saw the Accused for the first time in April 1994. The Chamber further notes that the Witness did not testify that any criminal acts were committed at Ndatemwa roadblock, either by the Accused or others.³⁴ The Chamber finds that the Defence has failed to demonstrate that this evidence is so prejudicial as to warrant exclusion. The Chamber will determine the weight to be given to Witness BBP's testimony regarding the Accused's presence at the roadblock when assessing the totality of the evidence. The Parties will also have an opportunity to address any issues concerning prejudice in their closing briefs.

19. Accordingly, the Chamber is satisfied that this portion of Witness BBP's evidence is sufficiently relevant and probative for the purposes of Rule 89 (C) and does not warrant exclusion.

²⁸ T. 20 October 2009, pp. 60 and 62. See p. 62: "Now, Witness, after the 7th of April 1994, did you see Jean-Baptiste Gatete again? Yes, I saw him again, and that was on the 9th."

²⁹ T. 20 October 2009, p. 15. Exhibit P1 indicates that Ndatemwa is in Murambi commune.

³⁰ Defence Motion, paras. 14-16. See also Defence Reply, para. 4.

³¹ T. 20 October 2009, p. 15.

³² See T. 20 October, pp. 15-16.

³³ Second Amended Indictment ("Indictment"), para. 13 alleges that the Accused planned and participated in the sealing off of roads and exits throughout Byumba in communes such as Murambi. It further alleges that the Accused circulated around the various roadblocks, provided lists for the identification and killing of Tutsis, gave orders at roadblocks to kill Tutsis, and manned roadblocks himself.

³⁴ T. 20 October 2009. See also T. 20 October 2009, p. 47: "Gatete was not prosecuted in Ndatemwa because he was only active in the Kiziguro area. I personally did not see him carrying out any acts in Ndatemwa."



c. January 1994 List (Witness AIK)

20. Witness AIK, a Tutsi, testified that he and his wife were named on a list of persons to be killed.³⁵ According to the Witness, the list was drawn up and published by the Accused in a newspaper.³⁶ The Witness was unsure about the precise date of publication but referred to the month of January 1994.³⁷

21. The Defence submits that the Indictment and the Pre-Trial Brief do not refer to any list of potential victims drawn up by the Accused prior to April 1994. It contends that the Prosecution is attempting to expand the Witness's testimony on a material fact that could underpin the charge of Conspiracy to Commit Genocide (Count Three of the Indictment) and that such evidence should be excluded for lack of notice.³⁸

22. The Chamber agrees that the alleged January 1994 list is not contained in the Indictment, the Pre-Trial Brief or Witness AIK's statement.³⁹ It is an entirely new allegation of which the Defence had no notice and potentially highly incriminating. The Chamber considers that its prejudicial effect outweighs its probative value and therefore excludes this portion of Witness AIK's evidence.

d. Attacks in Murambi Commune (Witness BBT)

23. Witness BBT testified that, prior to 1994, the Tutsi population of Murambi commune was accustomed to seeking refuge in Giti commune whenever the Accused launched attacks against them, claiming that they were accomplices of the *Inkotanyi*.⁴⁰ The Witness alleged further that the Accused would criticise the *bourgmestre* of Giti commune for hosting Tutsis.⁴¹

³⁵ T. 12 November 2009, p. 52. See also p. 53: "we had a government in our country that was anti-Tutsi. That government sought all means to exterminate and cause a disappearance of the Tutsi. In the light of that situation, we thought that even if President Habyarimana did not die, the Tutsi would still be persecuted. The Tutsis were highly persecuted within that period and such persecution was deeply disturbing for all the persons concerned."

³⁶ T. 12 November 2009, pp. 52-53. See p. 52, line 27: "It was because Gatete had drawn up a list of persons who had to die and our names featured on that list"; p. 52, line 37: "Yes, the names are found in a newspaper, in a copy of the newspaper that was published in Gatete's commune by Gatete himself"; p. 53, lines 7-9: "The newspaper lists the names of persons who had to be killed and the identifying material that had to be found on those people if they appeared at roadblocks because they had to be sorted out and killed."

³⁷ T. 12 November 2009, p. 53.

³⁸ Defence Motion, paras. 19-20. The Defence states that the witness statement disclosed to the Defence only referred to a newspaper which allegedly published a list of people considered to be *Ibyitso* in 1992 to 1993.

³⁹ While Witness AIK's witness statement, disclosed to the Defence, referred to a list of people considered to be *Ibyitso* published in a newspaper in 1992 or 1993, his testimony referred to a newspaper published in or around January 1994 and a newspaper published in 1993 as two distinct publications. T. 12 November 2009, p. 53.

⁴⁰ T. 10 November 2009, p. 56.

⁴¹ T. 10 November 2009, pp. 56-57. The Witness testified as follows: "When I said that I was used to seeking refuge at that place, what I mean is that right from the beginning of the war launched by the *Inkotanyi*, the Tutsis never felt safe. We were frequently attacked. We took refuge in Giti commune and the *bourgmestre* of Giti received us, welcomed us without problems, but sometimes Gatete would criticise the *bourgmestre* of Giti, asking him why he hosted us, why he welcomed us because Gatete claimed that there was no reason for us to be worried. But sometimes when we returned, we realised that our houses had been torched and that some people had even been killed. I would give the example of an old man and an old woman from Rwankuba who was killed before 1994. That happened before the death of President Habyarimana. I think I should not dwell on the events that occurred before 1994. But I thought it was nevertheless important to mention these incidents."



24. The Defence submits that this evidence relates to a material fact underpinning the charge of Conspiracy to Commit Genocide. It states that no notice was given in Witness BBT's statement and requests exclusion of this evidence.⁴²

25. The Chamber recalls that evidence of pre-1994 events is admissible in limited circumstances and that an accused may only be convicted for criminal conduct that occurred in 1994.⁴³ The existence of pre-1994 conduct continuing during 1994 is no exception to this rule.⁴⁴ In the present case, the Chamber notes that the evidence cannot form the basis of a conviction but may provide information relevant to background and context of specific allegations against the Accused, as noted in the Chamber's Decision of 2 October 2009.⁴⁵ The Chamber, being mindful of the limited purposes for which such evidence may be used, will determine its exact evidentiary value, if any, at a later stage.⁴⁶

26. With respect to the issue of prejudice, the Chamber notes that both the Indictment and the Pre-Trial Brief refer to alleged attacks on Tutsis in Murambi commune prior to 1994.⁴⁷ The Parties will also have an opportunity to address issues of prejudice in their closing briefs.

27. Accordingly, the Chamber finds that exclusion of this portion of Witness BBT's evidence is not warranted.

e. Names of Victims at Kiziguro Parish (Witness BBM)

28. Witness BBM testified that, just before killings started at Kiziguro Parish on 11 April 1994, the Accused, Nkundabazungu and the soldiers who accompanied them first took away two men named Munana and Karemera.⁴⁸

29. The Defence submits that this allegation was not in Witness BBM's statement and that it was unable to investigate it due to lack of notice.⁴⁹ The Prosecution submits that the names of the victims do not constitute material facts that go to the charges against the Accused.⁵⁰

⁴² Defence Motion, paras. 24-25.

⁴³ *Nahimana* Judgement (AC), para. 315. For example, a Trial Chamber may admit and rely on evidence relating to pre-1994 acts where such evidence is aimed at: (i) clarifying a given context, such as providing historical context or background; (ii) establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994; or (iii) demonstrating a deliberate pattern of conduct.

⁴⁴ *Nahimana* Judgement (AC), para. 317.

⁴⁵ Decision of 2 October 2009, para. 24. The Chamber held that the contested allegations at paragraphs 66 to 70 of the Pre-Trial Brief, which included allegations of pre-1994 events, do not constitute charges against the Accused. Rather, "[t]hese paragraphs merely provide information which is relevant to the background and the context of the specific allegations brought against the Accused in the Second Amended Indictment. Even if there are no references to pre-1994 events in the Second Amended Indictment, the Chamber considers that the timely disclosure of these factual allegations at this stage does not lead to unfairness or prejudice to the Accused."

⁴⁶ Decision on Defence Motion concerning Defects in the Indictment, 3 July 2009, para. 30.

⁴⁷ Indictment, para. 2, under the heading "The Accused", states that the Accused was "dismissed as *bourgmestre* in 1993 [...] amidst allegations that he persecuted the Tutsi of Murambi." In addition, see the Prosecution Pre-Trial Brief, para. 65: "[...] The Prosecutor will introduce evidence that will prove that Gatete was an instrumental part of a concerted action and coordinated action to persecute, terrorize and then finally exterminate Tutsi civilians. Moreover this action took place over a period of time, lasting nearly four years, from October 1990 through April 1994, beginning with sporadic instances of persecution and culminating in an intensely coordinated series of massacres in the month of April 1994.[...]" See further, paragraph 66 of the Pre-Trial Brief which states: "Beginning in late 1990, as *bourgmestre*, Gatete directly participated in a coordinated plan that resulted in thousands of Tutsis being imprisoned and dozens killed."

⁴⁸ T. 20 October 2009, pp. 66-67.



30. The Chamber notes that the names of Munana and Karemera are expressly mentioned at paragraph 19 of the Indictment as victims of the alleged massacre of several thousand persons at Kiziguro Parish.⁵¹ Further, the Prosecution Pre-Trial Brief states that Witness BBM was being called to testify on events relating to paragraph 19 of the Indictment.⁵² The Chamber also recalls that a witness is not bound strictly by what he has said in his statement, but that he "will be able to speak to matters immediately connecting or relevant to the issues that he has mentioned in his statement."⁵³ In the present case, the witness statement clearly refers to the killing of many Tutsis in Kiziguro Parish on 11 April 1994.

31. Accordingly, the Chamber does not exclude this portion of Witness BBM's testimony for lack of notice.

f. Meeting in Nyabisindu (Witness BBW)

32. Witness BBW testified in relation to paragraph 14 of the Indictment, which alleges that the Accused and local administrative officials held a meeting in Nyabisindu for the purposes of distributing weapons and instigating civilian militias to kill Tutsi civilians.⁵⁴ According to the Witness, the Accused arrived with others in a vehicle and, using a megaphone, asked the *Interahamwe* to meet him at Nyiringango's house.⁵⁵ The Witness further stated that his Godson came to inform him that the Accused gave instructions and distributed guns.⁵⁶

33. The Defence submits that Witness BBW made numerous additions to his witness statement during his in-court testimony. It contends that it had no notice of the exact location of the meeting, or the fact that weapons were distributed by the Accused, as these details were not disclosed in Witness BBW's statement. The Defence therefore submits that its ability to prepare for and investigate the additional information was impaired, and requests the Chamber to exclude this portion of Witness BBW's testimony.⁵⁷

34. The Prosecution submits that the details of the meeting provided to the Defence with regard to its date, time and sector were sufficient for it to conduct investigations and that it did not need to specify in which house the meeting was held.⁵⁸

35. The Chamber notes that the disputed event is pleaded in paragraph 14 of the Indictment, which states that a meeting was held on or about 7 April in Nyabisindu "for the

⁴⁹ Defence Motion, para. 26. See also Defence Reply, para. 7 and T. 20 October 2009, pp. 77-78. The Defence pointed out that these two names were mentioned by the Witness for the first time in court and were not contained in his written statement.

⁵⁰ Prosecution Response, para. 20.

⁵¹ Indictment, para. 19: "Several thousand civilian Tutsi men, women, and children, including Kalemera, the school inspector, Munana, a teacher, Claber Karurange, Gapfizi and BCS's brother, were slaughtered during the 11 April 1994 Kiziguro *paroisse* complex massacre."

⁵² Prosecution Pre-Trial Brief, p. 49.

⁵³ *Bizimungu et al.*, Oral Decision on Scope of Witness Testimony Outside of the Statement, 3 December 2004.

⁵⁴ Indictment, para. 14. See also Prosecution Pre-Trial Brief, para. 33.

⁵⁵ T. 13 November 2009, p. 10.

⁵⁶ T. 13 November 2009, p. 15.

⁵⁷ Defence Motion, paras. 30, 32, 33, 35.

⁵⁸ Prosecution Response, para. 18.



purpose of distributing weapons".⁵⁹ Further, the Pre-Trial Brief states that Witness BBW would testify to a meeting in Nyabisindu and that his testimony would relate to paragraph 14 of the Indictment.⁶⁰ While Witness BBW elaborated on the details of the meeting, the Chamber recalls that the Prosecution is not obliged to provide notice of all the evidence it intends to adduce to prove a material fact.⁶¹ The Chamber also recalls its observation above that a witness is not bound strictly by what is contained in his statement.⁶²

36. Accordingly, the Chamber does not exclude this portion of Witness BBW's evidence due to lack of notice.⁶³

FOR THESE REASONS the Chamber,

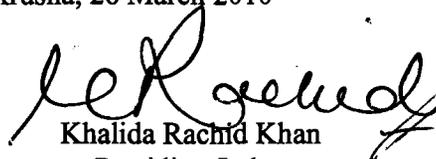
GRANTS the Defence Motion in part;

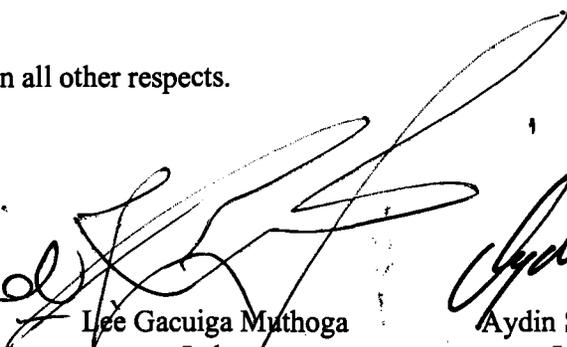
DECLARES inadmissible:

- (i) The portion of Prosecution Witness BBM's testimony relating to the actions of the Accused at the Gakoni Orphanage;⁶⁴ and
- (ii) The portion of Prosecution Witness AIK's testimony stating that the Accused drew up a list of people to be killed which was published in a newspaper in January 1994;⁶⁵ and

DENIES the Defence Motion in all other respects.

Arusha, 26 March 2010


Khalida Rachid Khan
Presiding Judge


Lee Gacuiiga Muthoga
Judge


Aydin Sefa Akay
Judge



⁵⁹ Indictment, para. 14, reads as follows: "On or about 7 April to 12 April 1994, Jean-Baptiste Gatete held meetings in various *secteurs* and *cellules* of Muramba *commune*, including, Rwankuba, Gakenke, Kiramuruzi, Gakoni and Nyabisindu for the purpose of distributing weapons and instigating civilians militias to exterminate Tutsi civilians whom he blamed for President Habyarimana's death. For example, at approximately 2am, Jean-Baptiste Gatete conducted meetings with local administrative officials in Nyabisindu to distribute weapons and to instigate civilian militias to kill Tutsi civilians whom he blamed for President Habyarimana's death. [...]"

⁶⁰ See Prosecution Pre-Trial Brief, p. 52.

⁶¹ *Ntagerura et al.* Judgement (AC), para. 21; *Ntakirutimana* Judgement (AC), para. 470; *Niyitegeka* Judgement (AC), para. 193.

⁶² See *supra* para. 30.

⁶³ *Nyiramasuhuko* Appeal Decision, para. 6; *Bizimungu* Decision of 2 September 2005, para. 16; *Karemura et al.*, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment, 19 October 2006, para. 18. See also Decision on Defence Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal, para. 17.

⁶⁴ T. 20 October 2009, p. 63 (lines 28-37). See also para. 18 above.

⁶⁵ T. 12 November 2009, pp. 52-53. See also para. 22 above.